Supreme Court, U.S.
FILED

991062 DEC 20 1999

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No. _____

In The

Supreme Court of the United States

THE STATE OF ARIZONA,

Petitioner,

v.

FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Arizona brought a civil racketeering action against the members of a marijuana importation and distribution enterprise and their marital communities. The trial court found that the enterprise had acquired $157 million in drug proceeds during the three years that defendant Francisco Leyva was a core member, but nonetheless held that any judgment over $50,000 would violate the Excessive Fines Clause. The State appealed. The Arizona Court of Appeals affirmed and determined that a civil *in personam* judgment in the amount of the proceeds acquired through racketeering is punishment when the defendant is subject to joint and several liability as a member of a racketeering enterprise. This Petition presents the following questions:

1. Is a civil *in personam* judgment in the amount of the proceeds of a racketeering enterprise "punitive" for Eighth Amendment purposes?

2. If a civil judgment here is "punitive," did the trial court err by ruling that any judgment over $50,000 would be constitutionally excessive when the court focused on the defendants' relative culpability and financial circumstances and ignored the harm caused by the drug enterprise?

PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona, which brought this civil racketeering action pursuant to A.R.S. § 13-2314(D)(6)(a). The State of Arizona was the plaintiff in the trial court and the appellant in the court of appeals.

Respondents are Francisco F. Leyva and Sylvia Leyva, husband and wife, who were defendants in the trial court and appellees in the court of appeals.

TABLE OF CONTENTS

Page

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The State and Federal Courts Are In Conflict Regarding Whether a Civil Judgment in the Amount of the Proceeds of a Racketeering Enterprise Is "Punitive" for Eighth Amendment Purposes 7

II. The Decision by the Arizona Court of Appeals That This Civil Forfeiture Is "Punitive" Conflicts with This Court's Precedents 11

III. The Arizona Court of Appeals' Erroneous Application of the Excessive Fines Clause Conflicts with This Court's Precedents 17

A. The Court of Appeals Misinterpreted *Austin* and Thus Erred in Converting the Legislature's Civil Sanction to a Criminal Sentencing 17

B. *Bajakajian* Requires Consideration of the Harm Associated with the Conduct Giving Rise to Forfeiture in Determining Whether a Civil Forfeiture Is "Grossly Disproportionate" 20

C. The Court's Guidance Here Would Prevent Unduly Limited and Unpredictable Sanctions 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Austin v. United States, 509 U.S. 602 (1993) 11, 13, 17, 19, 21

DeJonghe v. E.F. Hutton & Co., Inc., 830 P.2d 862 (Ariz. App. 1991)..... 14

Gore v. United States, 357 U.S. 386 (1958)..... 19

Harmelin v. Michigan, 501 U.S. 957 (1991)..... 21

In the Matter of 2120 S. 4th Ave, 870 P.2d 417 (Ariz. App. 1994)..... 11

One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972)..... 16

Ornelas v. United States, 517 U.S. 690 (1996)..... 26

Perry v. Apache Junction Elementary Sch. Dist. #43, 514 P.2d 514 (Ariz. App. 1973)..... 15

Pharaon v. Board of Governors, 135 F.3d 148 (D.C. Cir. 1998)..... 25

Solem v. Helm, 463 U.S. 277 (1983)..... 19

State of Arizona v. Leyva, 985 P.2d 498 (Ariz. App. 1998)..... *passim*

State of Arizona v. Leyva, 909 P.2d 506 (Ariz. App. 1995)..... 4

State v. Frodert, 924 P.2d 933 (Wash. App. 1996) ...8, 11

Stockwell v. United States, 13 Wall. 531 (1871) ...12, 13, 16

Tovrea Land and Cattle Company v. Linsenmeyer, 412 P.2d 47 (Ariz. 1966)..... 15

TABLE OF AUTHORITIES – Continued

Page

United States v. 25 Sandra Court, 135 F.3d 462 (7th Cir. 1998) 24

United States v. 3814 NW Thurman Street, 164 F.3d 1191 (9th Cir. 1999) 5, 8

United States v. Alexander, 32 F.3d 1231 (8th Cir. 1994) 5

United States v. Alexander, 108 F.3d 853 (8th Cir. 1997) 7

United States v. Bajakajian, 524 U.S. 321 (1998) ... *passim*

United States v. Carson, 52 F.3d 1173 (2d Cir. 1995) 8

United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) 8

United States v. Lippert, 148 F.3d 974 (8th Cir. 1998) 25

United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997) 7

United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995) 24

United States v. 6040 Wentworth Ave., 123 F.3d 685 (8th Cir. 1997) 24

United States v. 415 East Mitchell Avenue, 149 F.3d 472 (6th Cir. 1998) 24

United States v. Salerno, 481 U.S. 739 (1987) 20

United States v. Ursery, 518 U.S. 267 (1996) 12

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997) 5, 9

Vairo v. Clayden, 734 P.2d 110 (Ariz. App. 1987) 14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION:

U.S. Const. art. 3, § 2 1

Eighth Amendment 2, 4, 7, 11, 20

STATUTES:

28 U.S.C. § 1257 1

Ariz. Rev. Stat. § 13-2301 2

Ariz. Rev. Stat. § 13-2301(D)(6) 13

Ariz. Rev. Stat. § 13-2314 ..... 2, 4

Ariz. Rev. Stat. § 13-2314(A) 13, 20

Ariz. Rev. Stat. § 13-2314(D)(6)(a) 4, 8, 13, 14, 15, 16

Ariz. Rev. Stat. § 13-2314(D)(6)(b) 16

Ariz. Rev. Stat. § 13-2314(G)(1) 16

Ariz. Rev. Stat. § 13-2318 ..... 2, 14, 18, 20

Ariz. Rev. Stat. Ann. §§ 13-2314 to -2314.04 ..... 9, 10

Ariz. Rev. Stat. Ann. §§ 13-4301 to -4315 ..... 9, 10

Ark. Code Ann. §§ 5-64-505 to -508 ..... 9, 10

Colo. Rev. Stat. §§ 18-17-101 to -109 10

Del. Code Ann., tit. 11, §§ 1501 to 1511 10

Fla. Stat. Ann. §§ 895.01 to .09 10

Ga. Code Ann. § 16-13-49 ..... 9, 10

Haw. Rev. Stat. Ann. §§ 712A-1 to -20 ..... 9, 10

Iowa Code Ann. §§ 809A.1 to A.25 ..... 9, 10

TABLE OF AUTHORITIES – Continued

Page

Kan. Stat. Ann. §§ 60-4101 to -4125 .....9, 10

La. Rev. Stat. Ann. §§ 40:2601 to :2622 .....9, 10

Miss. Code Ann. §§ 97-43-1 to -9 10

Mo. Ann. Stat. §§ 513.600 to .653 10

Nev. Rev. Stat. §§ 207.350 to .520 10

N.J. Stat. Ann. § 2C:35A-2 10

N.J. Stat. Ann. §§ 2C:41-1 to -6.2..... 10

N.Y. C.P.L.R. 1311 10

N.C. Gen. Stat. §§ 75D-1 to D-14 10

Ohio Rev. Code Ann. §§ 2925.41 to .45..... 10

Okla. Stat. Ann. Tit. 22 §§ 1401 to 1419..... 10

Or. Rev. Stat. §§ 166.715 to .735..... 10

Or. Rev. Stat. §§ 475A.005 to .160 9

Tenn. Code Ann. § 39-11-708..... 10

Tenn. Code Ann. §§ 39-12-201 to -210..... 10

Utah Code Ann. § 58-37-13 10

Utah Code Ann. §§ 76-10-1601 to -1609 10

Wash. Rev. Code §§ 9A.82-001 to .904..... 10

Wis. Stat. Ann. §§ 946.80 to .88.....10, 11

1978 Ariz. Sess. Laws, Ch. 204, § 2 16

1982 Ariz. Sess. Laws, Ch. 200, § 3 16

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

15A C.J.S. *Conspiracy*, § 18 (1967) 15

Commission Forfeiture Reform Act (1993) 9

Model Asset Seizure and Forfeiture Act (1989) 9

Restatement (Second) of Torts § 875 (1977) 15

Restatement (Second) of Torts § 876 (1977) 15

OPINION BELOW

The Arizona Supreme Court's order denying Petitioner's petition for review is unreported. Appendix 1a-2a (Appendix A). The opinion of the Arizona Court of Appeals affirming the trial court is reported at 985 P.2d 498 (Ariz. App. 1998) and is included in Appendix 3b-22b (Appendix B). The order of the trial court is not published. Appendix 23c-37c (Appendix C). The previous opinion of the Arizona Court of Appeals remanding this case to the trial court is reported at 909 P.2d 506 (Ariz. App. 1995), and is included in Appendix 38d-53d (Appendix D).

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the opinion of the Arizona Court of Appeals. The Arizona Supreme Court denied Petitioners' petition for review on September 21, 1999. Petitioners have timely filed this petition for writ of certiorari within ninety days of that denial. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2, and 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. Arizona Revised Statutes (A.R.S.) §§ 13-2301 (in pertinent part), -2314, and -2318 are reprinted in Appendix 54e-64e (Appendix E).

STATEMENT OF THE CASE

A. Material Facts

The Somoza enterprise was a long-term, multi-million dollar drug organization engaged in the importation, transportation, and sale of marijuana. It distributed ton quantities of marijuana on a weekly basis; each ton produced $1 million in proceeds at a wholesale market price of $500 a pound. Appendix 24c. Defendant Francisco Leyva was a core member of the Somoza enterprise between January 1987 and December 1989. During that time, the enterprise had five marijuana farms in Mexico, producing a total of one hundred tons of marijuana each year. About half of the marijuana produced by the Somoza enterprise from 1987 through 1989 was seized. Nevertheless, the actual proceeds acquired by the Somoza enterprise between January 1987 and December 1989 amounted to $157 million, based only on the marijuana that eluded seizure and was actually sold. Appendix 25c.

Leyva's primary role in the enterprise was to participate in the management and direction of its financial affairs. Appendix 25c. Leyva himself collected proceeds of at least $1.4 million from the sale of marijuana. Appendix 26c. He maintained the keys to the safe deposit box containing the marijuana proceeds at a bank in Nogales, Sonora, Mexico, where the enterprise kept at least $1 million. *Id.* Leyva used the millions of dollars in marijuana proceeds that flowed through this process for enterprise expenses. Appendix 25c. He was, for example, integrally involved in arranging a $1.2 million bribe to a Mexican Federal Judicial Police Commandant in October 1989 to secure the release of a portion of forty tons of seized marijuana. Appendix 26c.

In 1989, at the conclusion of a multi-agency investigation and court-ordered wiretap, agents conducted simultaneous searches, arrests, and seizures in Tucson, in the greater Phoenix area, and in Nogales, Arizona, the Leyvas' home town on the Arizona/Mexico border. Somoza, Leyva, and others were charged with racketeering and drug and money laundering offenses. In the companion criminal case, Leyva pled guilty to racketeering and money laundering offenses.

B. Proceedings Below

The State initiated a civil forfeiture action against Francisco Leyva and his wife, among others, seeking *in personam* and *in rem* forfeiture judgments based on the conduct for which Leyva was indicted and on related conduct. The State obtained a judgment of $20 million

against members of the enterprise, which was entered against Leyva and his marital community in April, 1993. The Leyvas appealed, arguing that the judgment was precluded by the Double Jeopardy Clause and was excessive in violation of the Excessive Fines Clause. The court of appeals reversed on double jeopardy and excessive fines grounds and remanded the case for the trial court to determine the appropriate sanction. *State of Arizona v. Leyva*, 909 P.2d 506 (Ariz. App. 1995) (*Leyva I*). Appendix 38d-53d.

On remand, the trial court ruled only on the excessive fines issue. The Leyvas stipulated that the enterprise had acquired at least $10 million in drug proceeds while Leyva was a member. The State requested a judgment of $10 million, based solely on the drug proceeds acquired by the enterprise while Leyva was a member.

The trial court found that the enterprise made $157 million in drug proceeds during that time. Appendix 25c. The trial court also found that applying A.R.S. § 13-2314(D)(6)(a) mandates a judgment of no less than the stipulated minimum proceeds of $10 million, subject to any constitutional limits on the judgment. Appendix 28c. Although the court found that the legislative intent of A.R.S. § 13-2314 is remedial and that there was no evidence that the statute's purpose or effect is punitive, it nevertheless felt constrained by the conclusions of the court of appeals in *Leyva I*. The court concluded that any judgment greater than $50,000 would constitute punishment prohibited by the Excessive Fines Clause of the Eighth Amendment. In reducing the figure to $50,000, the trial court considered the nature of Mr. Leyva's personal culpability, as reflected by his role in the enterprise; the

large number of people who participated in the enterprise; and the defendants' inability to pay as determined by the defendants' present salary and income. Appendix 29c.

The court of appeals affirmed this judgment. It found the statute punitive despite its limitation to the amount of illegally obtained proceeds, Appendix 7b-17b, *State v. Leyva*, 985 P.2d 498, 501-504 at ¶¶ 8-25, and reviewed the trial court's calculation of excessiveness only for clear error. Appendix 19b, *Id.* at 505-06, ¶ 32. The Arizona Supreme Court denied the State's petition for review. Appendix 1a.

REASONS FOR GRANTING THE WRIT

The court of appeals' opinion reflects the confusion of lower courts concerning whether a civil *in personam* judgment based on the proceeds of an offense is punitive and therefore subject to review under the Excessive Fines Clause. State and federal courts, before and after this Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), have concluded that the forfeiture of proceeds is not punishment under the Excessive Fines Clause because "it simply parts the owner from the fruits of the criminal activity." *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994). In contrast, however, the Arizona court here and the courts of appeals for the Eighth and Ninth Circuits have concluded that a forfeiture based on the proceeds of an offense can be punitive and excessive. *See United States v. 3814 NW Thurman Street*, 164 F.3d 1191 (9th Cir. 1999), and *United States v. Van Brocklin*, 115 F.3d

587 (8th Cir. 1997), *cert denied sub nom. Hastings v. United States*, 118 S.Ct. 1804 (1998). This Court's guidance is needed both to resolve the conflict among the lower courts and to provide certainty to the many other States that have enacted civil *in personam* statutes that are very similar to the statute at issue here.

The court of appeals' opinion also reflects fundamental confusion concerning the application of the "grossly disproportionate" standard. Instead of addressing the magnitude of the societal harm caused by the multi-million dollar drug organization, of which Mr. Leyva was a core member, the trial court reduced the judgment to a fraction of the proceeds involved based primarily on Mr. Leyva's role in the enterprise and on the Leyvas' financial condition. The court of appeals, using a clear error standard, affirmed. This method effectively converts the civil action, which the Legislature intended as a remedial tool to return to society some of the vast costs imposed by illegal drugs, into a process fundamentally the same as a criminal sentencing. The process below also thwarts any deterrent effect of the statute by reducing the judgment to an inconsequential amount.[1] This result conflicts with this Court's direction in *Bajakajian* to give substantial

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[1] The dissent in *Bajakajian* noted that drug dealers pay money launderers 20-26% commissions as a cost of doing business, 524 U.S. at 354 (Kennedy, J., dissenting), and observed that "money launderers will rejoice to know they face forfeitures of less than 5% of the money transported." *Id.* A 5% assessment would support a judgment of $7.85 million in this case. Under *Leyva*, Arizona drug racketeers and money launderers now face an assessment of .032%, which is 1/156 of 5%.

deference to legislative judgment concerning the appropriate sanction. 524 U.S. at 336. Moreover, the courts' method of applying the Excessive Fines Clause test limits civil judgments unduly and creates enormous disparities and unintended unpredictability in the resulting sanctions.

I. The State and Federal Courts Are in Conflict Regarding Whether a Civil Judgment in the Amount of the Proceeds of a Racketeering Enterprise Is "Punitive" for Eighth Amendment Purposes.

The court of appeals' conclusion that an *in personam* forfeiture based on the stipulated amount of drug proceeds is punitive for Eighth Amendment purposes is directly contrary to the numerous decisions that hold that the forfeiture of proceeds is inherently remedial. *See, e.g., United States v. Alexander,* 108 F.3d 853, 855 (8th Cir. 1997) ("The forfeiture of proceeds from the illegal enterprise is not considered punishment subject to the excessive fines analysis because the forfeiture of proceeds simply deprives the owner of the fruits of his criminal activity."); *United States v. Lot 41, Berryhill Farm Estates,* 128 F.3d 1386, 1395-1396 (10th Cir. 1997) ("on a macroeconomic level, the estimated proceeds of illegal drug sales are roughly equivalent to the yearly costs drugs inflict on society and government . . . on a microeconomic level, the forfeiture of drug proceeds, contrasted with the types of properties considered by the Supreme Court in *Austin,* extracts from the particular drug trafficker with some precision an amount of money equivalent to the costs that the drug dealer has imposed on society. . . . [so] the

forfeiture of those proceeds can never be constitutionally excessive"); *United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995) (forfeiture of money laundering proceeds of $136 million did not violate Excessive Fines Clause because "holding a defendant liable for an amount of money foreseeably laundered by himself and his own co-conspirators is quite rational based on a proportionality analysis."); *United States v. Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995) (portion of federal RICO that forms model for this A.R.S. § 13-2314(D)(6)(a) cause of action is compensatory); *State v. Frodert*, 924 P.2d 933, 936-939 (Wash. App. 1996) (upholding $250,000 judgment in "an amount equal to the gain a person has acquired or maintained" through criminal profiteering because "forfeiture of proceeds cannot be considered punishment"). Almost all state and federal courts considering the issue have held that a forfeiture of proceeds is not subject to review under the Excessive Fines Clause.

The Arizona Court of Appeals is not alone, however, in concluding that forfeiture of proceeds is punitive. The Ninth Circuit, relying on *Bajakajian*, has held that the forfeiture of fraud proceeds violates the Excessive Fines Clause and remanded such a forfeiture to the district court for a determination of what part of the proceeds forfeiture would be permissible under *Bajakajian*. *3814 NW Thurman Street*, 164 F.3d at 1197-99; *but see id.* at 1199 (Rymer, J., dissenting) (finding that *Bajakajian* did not control and that the forfeiture of proceeds of criminal activity cannot be excessive). In a pre-*Bajakajian* case, the Eighth Circuit came to a conclusion similar to that of the Arizona Court of Appeals. *Van Brocklin*, 115 F.3d at 601

(money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her co-defendants, reaped little benefit personally).

This Court should grant review not only to resolve the existing conflict concerning the remedial nature of the forfeiture of illegal proceeds, but also to give guidance to the many States that have or will enact statutes similar to the Arizona statutes at issue here. These Arizona statutes are the basis for a national model civil forfeiture statute promulgated in 1989 by the American Prosecutors Research Institute, called the Model Asset Seizure and Forfeiture Act, and for the forfeiture provisions of the President's Commission on Model State Drug Laws, called the Commission Forfeiture Reform Act (CFRA), promulgated in 1993. *See* CFRA, being lodged simultaneously with this Petition. These models employ only civil *in rem* and civil *in personam* procedures; neither employs criminal forfeiture procedures. These two very similar models, and variations of them, are in effect in eight States,[2] and are being actively promoted by the National Alliance for Model State Drug Laws. There are now a total of thirteen States that have *in personam* civil

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[2] Ariz. Rev. Stat. Ann. §§ 13-4301 to -4315, 13-2314 to -2314.04 (West 1998); Ark. Code Ann. §§ 5-64-505 to -508 (Michie 1993); Ga. Code Ann. § 16-13-49 (1999); Haw. Rev. Stat. Ann. §§ 712A-1 to -20 (Michie 1998); Iowa Code Ann. §§ 809A.1 to A.25 (West 1999); Kan. Stat. Ann. §§ 60-4101 to -4125 (1994); La. Rev. Stat. Ann. §§ 40:2601 to :2622 (West 1999); and Or. Rev. Stat. §§ 475A.005 to .160 (1998).

forfeiture statutes.[3] In addition to these state statutes, numerous States provide for civil judgments on behalf of persons injured by racketeering conduct, sometimes specifically including the State as an injured person. At least thirteen States allow for a civil judgment/fine tied directly to the amount obtained through racketeering or some multiple of it.[4] This Court's guidance on the application of the

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[3] States employing *in personam* civil forfeiture include: Ariz. Rev. Stat. Ann. §§ 13-4301 to -4315, 13-2314 to -2314.04 (West 1998); Ark. Code Ann. §§ 5-64-505 to -508 (Michie 1993); Ga. Code Ann. § 16-13-49 (1999); Haw. Rev. Stat. Ann. §§ 712A-1 to A-20 (Michie 1998); Iowa Code Ann. §§ 809A.1 to A.25 (West 1999); Kan. Stat. Ann. §§ 60-4101 to -4125 (1994); La. Rev. Stat. Ann. §§ 40:2601 to :2622 (West 1999); Mo. Ann. Stat. §§ 513.600 to .653 (West 1999); N.J. Stat. Ann. 2C:35A-2 (West 1999); N.Y. C.P.L.R. 1311 (McKinney 1997); N.C. Gen. Stat. §§ 75D-1 to D-14 (1999); Tenn. Code Ann. § 39-11-708 (1998); and Utah Code Ann. § 58-37-13 (1999).

[4] States providing for a financial sanction tied directly to the amount of the illegal gain include: Ariz. Rev. Stat. Ann. §§ 13-4301 to -4315, 13-2314 to -2314.04 (West 1998) (amount acquired through racketeering); Colo. Rev. Stat. §§ 18-17-101 to -109 (1998) (three times the gross value gained or three times the gross loss caused, whichever is greater); Del. Code Ann., Tit. 11, §§ 1501 to 1511 (1998) (same); Fla. Stat. Ann. §§ 895.01 to .09 (West 1994) (same); Miss. Code Ann. §§ 97-43-1 to -9 (1999) (same); Nev. Rev. Stat. §§ 207.350 to .520 (1997) (same); N.J. Stat. Ann. §§ 2C:41-1 to -6.2 (West 1999) (not to exceed three times the amount of gain); Ohio Rev. Code Ann. §§ 2925.41 to .45 (Anderson 1999) (not more than twice the gross profits or other proceeds); Okla. Stat. Ann. Tit. 22 §§ 1401 to 1419 (West 1999) (not to exceed three times the gross value gained or three times the gross loss caused, whichever is greater); Or. Rev. Stat. §§ 166.715 to .735 (1998) (same); Tenn. Code Ann. §§ 39-12-201 to -210 (1998) (same); Utah Code Ann. §§ 76-10-1601 to -1609 (1999) (no more than twice the profits); Wash. Rev. Code §§ 9A.82.001 to .904 (1998) (amount of the illegal gain); Wis. Stat. Ann.

Excessive Fines Clause is critical to States that have similar statutes and to state legislatures considering such statutes. *Compare Leyva with In the Matter of 2120 S. 4th Ave*, 870 P.2d 417, 421 (Ariz. App. 1994) (*in rem* forfeiture under Arizona statute is remedial for Eighth Amendment purposes) and *State v. Frodert*, 924 P.2d 933, 936-939 (Wash. App. 1996) (Washington statute modeled on Arizona law authorizing judgment in "an amount equal to the gain a person has acquired or maintained" through a criminal offense is purely remedial for both double jeopardy and excessive fines purposes).

II. The Decision by the Arizona Court of Appeals That This Civil Forfeiture Is "Punitive" Conflicts with This Court's Precedents.

The court of appeals rejected the State's argument that a $10 million forfeiture was not punitive because it was directly tied to the proceeds acquired by the drug enterprise while Mr. Leyva was a core member. Relying on *Austin v. United States*, 509 U.S. 602 (1993), the court found the statute punitive because of its joint and several liability provisions and the fact that *in personam* forfeitures are generally criminal. Appendix 9b-16b, 985 P.2d at 502-04, ¶¶13-23. The court of appeals' conclusion is inconsistent with this Court's recognition in *Bajakajian* that criminal *in personam* forfeitures are distinguishable from early non-punitive *in personam* monetary sanctions

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§§ 946.80 to .88 (West 1999) (not to exceed two times the gross value gained or two times the gross loss caused, whichever is greater).

intended to indemnify the government. 524 U.S. 340-44.[5] The *in personam* forfeiture here is similar to the civil action in debt at issue in *Stockwell v. United States*, 13 Wall. 531 (1871).

The Court in *Bajakajian* defined the category of "nonpunitive forfeitures" to include many *in personam* actions. It adopted a dictionary definition of "remedial action" as one "brought to obtain compensation or indemnity." 524 U.S. at 329. The Court then discussed early *in personam* monetary sanctions that were "not considered punishments for criminal offenses," *id.* at 341-44, and gave meaning to the word "indemnity" by quoting its use in *Stockwell v. United States*, 13 Wall. at 546, to include actions "designed . . . to secure [the] rights [of the government]" based on governmental "losses" calculated by reference *not* to actual out-of-pocket losses to the public fisc but rather by reference to evasion of governmentally imposed duties, the circumstances and amount of which are set by Congress. 524 U.S. at 342. "Every act, therefore, which interferes with the right of the government to seize and appropriate the property which has been forfeited to it . . . is a wrong to property rights, and is a fit subject for indemnity." *Id.* (quoting *Stockwell*, 13 Wall. at 546). "Thus suits for the payment of monetary forfeitures were viewed no differently than suits for the customs duties themselves." 524 U.S. at 343 n. 18.

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[5] The court's conclusion is also inconsistent with this Court's recognition in *United States v. Ursery*, 518 U.S. 267, 291 (1996), that the forfeiture of the proceeds of illegal drug activity serves the nonpunitive goal of "ensuring that persons do not profit from their illegal acts."

This Arizona civil statute falls into the "nonpunitive" category described in *Bajakajian* because it is a civil *in personam* action for compensation or "indemnity" and therefore a descendant of the "civil action in debt" in *Stockwell*. Arizona's racketeering statutes, A.R.S. § 13-2314(A), provide for judicial authority "to remedy racketeering," a phrase that is defined in A.R.S. § 13-2301(D)(6):

> "To remedy racketeering" means to enter a civil judgment pursuant to [the racketeering chapter or the forfeiture chapter of the title] against property or a person who is *subject to liability*, including liability for *injury to the state* that is caused by racketeering *or by actions in concert with racketeering*.

(Emphasis added). The term "subject to liability" is classic tort parlance. The specification of liability for injury to the State that is caused either by racketeering or by "actions in concert with racketeering" is an explicit reference to general civil liability concepts, under which persons are "subject to liability" under a wide variety of theories, including liability for damages caused by persons "acting in concert."

Criminal culpability is not an element of civil liability under A.R.S. § 13-2314(D)(6)(a), which distinguishes it from the statutes at issue in *Austin* and *Bajakajian*. While criminal conduct giving rise to forfeiture is required as an element of a forfeiture, the defendant is not required to be criminally responsible for that conduct. The Arizona

statute provides for vicarious liability based on civil criteria such as marriage and acting in concert.[6] Judgments under A.R.S. § 13-2314(D)(6)(a) must, under A.R.S. § 13-2318, be based on only civil, non-punitive criteria. That statute forbids the decrease or increase of the judgment in a civil racketeering action because of the imposition or failure to impose a sanction in a separate criminal prosecution involving the same conduct. It requires that civil judgments be set exclusively by the civil liability provided for in the civil statutes, including injury to the State. It also declares that the removal of money from the legitimate economy in exchange for marijuana is an injury to the State. The legislative goal in A.R.S. § 13-2314(D)(6)(a) is compensation for this injury. This sanction is thereby distinct from criminal punishment, in which the amount of the punishment is based on personal criminal culpability and on other characteristics of the defendant, such as criminal history, age, likelihood of violence or general recidivism, likelihood of successful rehabilitation, remorse, and acceptance of responsibility.

Civil enterprise liability under this statute naturally parallels civil conspiracy liability. The gravamen of a civil conspiracy in Arizona is the damage done by acts in furtherance of the conspiracy.

> [T]here is no such thing as a civil action for conspiracy; the action is one for damages arising

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[6] This is consistent with civil racketeering liability under other applications of the statute, which do not require scienter for recovery. *See DeJonghe v. E.F. Hutton & Co., Inc.*, 830 P.2d 862 (Ariz. App. 1991) (private securities fraud case under civil racketeering statute); *Vairo v. Clayden*, 734 P.2d 110 (Ariz. App. 1987) (same).

> out of the acts committed pursuant to the conspiracy, and damage for which recovery may be had in such civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts.

Perry v. Apache Junction Elementary Sch. Dist. #43, 514 P.2d 514, 517 (Ariz. App.1973), *citing Tovrea Land and Cattle Company v. Linsenmeyer*, 412 P.2d 47 (Ariz. 1966). Under the general rule for civil conspiracy, "conspirators are jointly and severally liable for all damage resulting from the conspiracy, each being responsible for the acts of the other in furthering the common design." 15A C.J.S. *Conspiracy*, § 18 (1967). A person is "responsible for everything done by his co-conspirators which follows incidentally in the execution of the common design as one of its probable and natural consequences." *Id.*[7]

In addition to vicarious civil liability based on conduct, liability under A.R.S. § 13-2314(D)(6)(a) may attach without personal conduct or culpability of any kind. In this case Mrs. Leyva was never accused of any wrongdoing or guilty knowledge; her community property is nevertheless subject to the judgment. When civil liability is

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[7] The type of harm involved in an enterprise violation generally dictates joint and several liability as among contributing tortfeasors. "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Restatement (Second) of Torts § 875 (1977). An enterprise offense invariably involves persons acting in concert. As the Restatement explains in connection with persons acting in concert, "The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one." *Id.*, § 876 cmt. a.

based on entirely civil concepts of responsibility, it cannot be proportioned to the "gravity of the defendant's offense," *Bajakajian*, 524 U.S. at 337, because there is no offense for which the defendant is being punished. Under *Bajakajian*, the appropriate conclusion in these circumstances is that the sanction is not a "fine" in the first instance.

The court of appeals erroneously associated *in personam* liability with punishment because the post-1970 federal *in personam* forfeiture statutes are criminal. Appendix 14b, 985 P.2d at 503-04, ¶20. This historical development does not apply to civil *in personam* forfeitures pursuant to the Arizona Racketeering Act. Originally, the Act contained no forfeitures. *See* 1978 Ariz. Sess. Laws, Ch. 204, § 2. Four years later, the Legislature added forfeiture provisions to the then-existing injunction and statutory tort provisions of A.R.S. § 13-2314(D)(6)(a) and (b). 1982 Ariz. Sess. Laws, Ch. 200, § 3. These civil *in personam* forfeitures simply make the collection of the civil damages more likely and more efficient by giving the State the authority to seize property prior to judgment, a pragmatic evolution that did not change the remedial nature of the judgment.

The statute at issue here, A.R.S. § 13-2314(D)(6)(a), is therefore a first cousin of the statute at issue in *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972), in that it employs *in personam* jurisdiction to effect the same remedial purposes pursued by a non-punitive *in rem* sister provision, here A.R.S. § 13-2314(G)(1) (*in rem* forfeiture of proceeds acquired through racketeering enterprise). It is thus a descendant of the type of *in personam* civil sanction at issue in *Stockwell* and the many

monetary forfeiture cases and statutes cited by the dissent in *Bajakajian*. 524 U.S. at 344-47 (Kennedy, J., dissenting).

III. The Arizona Court of Appeals' Erroneous Application of the Excessive Fines Clause Conflicts With This Court's Precedents.

Austin established that the Excessive Fines Clause may apply to a statute that is civil, rather than criminal, to the extent that it assesses "punishment for an offense." 509 U.S. 602, 609-610. The pivotal issue in administering such a civil statute is determining whether all or some part of a judgment allowed by the statute is excessive. The court of appeals erred in making this determination by focusing only on the culpability and financial situation of the defendants. It thereby transformed the civil forfeiture action into something in the nature of a sentencing proceeding. This approach leads to unduly limited and unpredictable results, such as the *de minimis* judgment here.

A. The Court of Appeals Misinterpreted *Austin* and Thus Erred in Converting the Legislature's Civil Sanction to a Criminal Sentencing.

The Arizona court's focus on the blameworthiness of the civil defendants is based on a misinterpretation of *Austin* as treating forfeitures as adjuncts to or substitutes for criminal punishment. This confuses the remedial goals of the civil action with the punitive goals of criminal sanctions. Factors that are relevant for one purpose are not necessarily relevant for the other. The applicable

statutes do not permit the "culpability" of the civil defendant to result in a larger forfeiture based on personal factors such as criminal history, personal background, likelihood of recidivism, lack of remorse or evil intent beyond whatever state of mind is required for civil liability, *if any* state of mind is required. Nor do they suggest that the defendant's ability to pay a judgment is relevant. A.R.S. § 13-2318.

The imposition of a "sentencing phase" after a determination of civil liability creates a second sorting gate through which each civil judgment must pass before it becomes final. Those judgments that pass successfully through this second gate are those imposed on persons who, if charged with a crime, would have received substantial criminal sentences, such as people who acted with intentional cruelty or recidivists. The criminal punishment model is designed to directly impact only the very small core of behavior that is appropriately punished as criminal. The social responsibility model of civil liability is designed to affect a far wider band of conduct and a far larger set of individuals and enterprises, based on damage rather than culpability. The immense effects of civil liability on social behavior are different than the effects of incarcerating the relative few upon whom criminal punishment falls and are due, in large part, to the very fact that the civil law applies to many persons in many circumstances in which criminal punishment would not be appropriate.

The effect of the judicial treatment of the entire amount involved in this civil forfeiture as a criminal sentence is to force the creation of a criminal sanction out of a civil sanction. If some form of criminal culpability is

constitutionally required to avoid excessiveness, whether by requiring criminal intent or by assessing a judgment based on personal factors appropriate to criminal sentencing, then all civil actions must pass through this two-gate process. Therefore, the most purely remedial civil theories of recovery, such as spousal liability, joint and several liability, and donee liability in proceeds forfeiture cases and entrustment and agency liability in facilitation forfeiture cases, are constitutionally forbidden. What began in *Austin* as a limit on those forfeitures that *do* require criminal culpability under the statute invoked would be converted into a rule that all forfeitures *must* require criminal culpability. The legislative determination that a person is subject to liability for proceeds acquired through criminal conduct based on civil criteria alone would be undermined. This Court has never sanctioned such a departure from what is fundamentally a legislative prerogative. *See Bajakajian*, 524 U.S. at 336 ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature.") (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes") and *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.")).

B. *Bajakajian* Requires Consideration of the Harm Associated with the Conduct Giving Rise to Forfeiture in Determining Whether a Civil Forfeiture Is "Grossly Disproportionate."

The court of appeals' criminal sentencing model allowed it to disregard the factors later described in *Bajakajian*. *Bajakajian's* analysis is consistent with the Court's interpretation of the Excessive Bail Clause of the Eighth Amendment. The Court reads "excessive" in that clause to require proportionality between the amount of bail and the "interest the Government seeks to protect," *i.e.*, the risk of flight. *United States v. Salerno*, 481 U.S. 739 (1987). In proceeds forfeiture cases, the interests the government seeks to protect are preventing and controlling the conduct giving rise to forfeiture by disgorgement of the ill-gotten gain; reducing the economic incentive to engage in the conduct; depriving the illegal industry of necessary capital and financial power; compensating the State for its injury, including effects on the economy; and rededicating forfeited assets to remedial purposes. A.R.S. §§ 13-2314(A) and 13-2318. Each of these is related to the objective damage done. Section 13-2318 forbids the consideration of punishment of "criminal culpability."

Consistent with *Bajakajian*, the Arizona Court of Appeals should have considered the proportionality between the statutorily established forfeiture amount and the injury to the State, including the measures of damage in A.R.S. § 13-2318 and the general damages like those

described in *Harmelin v. Michigan*, 501 U.S. 957 (1991).[8] Instead, the court of appeals disregarded the direct connection between the amount of the judgment and the public harm in favor of its criminal sentencing model, and concluded that the forfeiture here had " 'absolutely no correlation to any damage sustained by society or to the cost of enforcing the law.' " Appendix 13b-14b, 985 P.2d at 503, ¶19 (quoting *Austin*, 509 U.S. at 621).

Although the Court has not explicitly stated that only the non-remedial portion of a forfeiture is subject to the "grossly disproportionate" test, this conclusion would be consistent with the Court's approach in *Austin* and *Bajakajian*. In *Austin*, the Court noted that it made "little practical difference whether the Excessive Fines Clause applies to all forfeitures" under the statute at issue there or "only to those that cannot be characterized as remedial" because the Excessive Fines Clause "prohibits only the imposition of 'excessive fines,' and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event." 509 U.S. at 622 n. 14. *Austin* suggests that any portion of a fine that is remedial is not excessive

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[8] "Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. See Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence 16, 24-36 (N. Weiner, M. Wolfgang eds., 1989). Studies bear out these possibilities, and demonstrate a direct nexus between illegal drugs and crimes of violence." *Harmelin*, 501 U.S. at 1002-03 (Kennedy, J., concurring).

and necessarily the converse, *i.e.*, that only the portion of the fine that is not remedial may be excessive.

In *Bajakajian*, the Court found that Bajakajian's failure-to-report crime caused minimal damage to the government and that there was no correlation between the amount forfeited and that minimal harm. 524 U.S. at 339. The Court also distinguished the fine at issue there, which served no remedial purposes, from those that serve "the remedial purpose of reimbursing the government from the evasion of custom duties." *Id.* at 340. The Court's emphasis on correlating the forfeiture to the government's harm also suggests that only the punitive portion should be measured for excessiveness. This analysis implies that a court must focus first on the harm caused by the conduct giving rise to forfeiture in assessing a claim that the forfeiture is excessive. Only that portion of the forfeiture, if any, that exceeds the harm can be punitive; and only the punitive portion should be measured to determine whether it is "grossly disproportionate" considering such factors as the defendant's relative culpability or financial situation. The court of appeals, by applying a quasi-sentencing approach to this civil forfeiture action, erred in considering the entire amount of the forfeiture as punitive in determining whether it was grossly disproportionate to the defendant's conduct.

C. The Court's Guidance Here Would Prevent Unduly Limited and Unpredictable Sanctions.

The choice between a civil liability mode and a criminal sentencing mode is pivotal for government resource allocation because erecting a criminal sentencing gate

after the civil liability gate drastically narrows the set of persons that may ultimately be held civilly liable and, separately, because it makes the process unpredictable.

In *Leyva* the potential judgment of $157 million (of which the State sought $10 million) was reduced to $50,000, a discount of 99.968%. This demonstrates the unpredictability that results from the court's inappropriate application of the Excessive Fines Clause. In *Bajakajian*, this Court considered the severity of Bajakajian's crime, finding it minimal, and whether the conduct was related to other illegal activities, finding it was not. This Court considered the harm caused by the crime, whether the statute created inherent proportionality between the statutory sanction of forfeiture and the injury, and whether the conduct giving rise to forfeiture fits into the categories for which the forfeiture statutes were intended, such as drug trafficking and money laundering. 524 U.S. at 337-40.

A court applying the Arizona Court of Appeals' sentencing model has little use for these considerations. The conduct giving rise to forfeiture in *Leyva* was the enormous drug importation enterprise and the many serious related offenses, including drug sales, bribery of law enforcement and judicial officials, and drug money laundering. The harm caused by Leyva's enterprise was the harm associated with the consumption of 157 tons of marijuana, the removal of $157 million from the legitimate economy, and the corruption of law enforcement. There is a direct and fixed correlation of the statutory sanction of forfeiture of the amount of the property acquired through drug dealing and the injury to the State. Leyva's enterprise did in fact drain $157 million out of

the country in exchange for illegal drugs. Finally, the money laundering and drug offenses in *Leyva* are those for which the forfeiture statutes were intended. These facts were of no consequence in the court's estimation because the court concluded that the Leyvas did not merit criminal punishment. If the trial court can see that the "criminal sentencing" gate is going to preclude any substantial civil judgment, the amount of social damage becomes insignificant.

No reported case in any state or federal court, decided either before or after *Bajakajian*, approaches the degree of restriction on a legislatively determined sanction that the court created in *Leyva*. *See, e.g., United States v. 415 East Mitchell Avenue*, 149 F.3d 472 (6th Cir. 1998) (court approved forfeiture of home with equity of $220,000 where defendant had 200 grams of marijuana, some seeds, and 19 plants at his indoor residential grow); *United States v. 25 Sandra Court*, 135 F.3d 462 (7th Cir. 1998) (property with equity of about $60,000 was properly forfeited based on responsibility for just under 4 pounds of marijuana); *United States v. 6040 Wentworth Ave.*, 123 F.3d 685, 689 (8th Cir. 1997) (marijuana grow containing 6.6 pounds of marijuana and 265 plants (200 of which were just cuttings) supported a $60,000 forfeiture); *United States v. Plescia*, 48 F.3d 1452 (7th Cir. 1995) ($30,000 forfeiture was supported by a $50,000 drug deal, a ratio of 3/5). The Arizona court's application of criminal sentencing criteria led to a result incompatible with these cases if compared under any objective criteria, such as the amount or value of the drugs involved, the length

of the activity, or other objective measures of societal harm.

The ratio of money received ($157 million) to permissible sanction ($50,000) in *Leyva* is 1/.00032. Applying this ratio to other types of cases, the maximum constitutional financial sanction for a $100,000 stock fraud would be $100,000 x .00032 = $32, less than the assessment for a parking ticket. For a $1 million state land swap swindle the limit would be $320. Even focusing only on the $1.4 million Leyva actually personally possessed, $50,000 is 3.57% of that amount. This is a tiny fraction of the taxes he would be obliged to pay on this drug money income. To say nothing of criminal fines, many regulatory assessments, licensing violation penalties, tax penalties, pollution assessments, child support late fees, and civil penalties fall far over this ratio. *See, e.g., United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998) (civil penalty judgment of almost ten times defendant's personal gain by fraudulent kick-backs does not violate Excessive Fines Clause); *Pharaon v. Board of Governors*, 135 F.3d 148, 154 (D.C. Cir. 1998) ($37 million civil penalty for acting as nominee in a conspiracy to hide ownership of a bank from federal regulators upheld where defendant's personal liability was based on a statute making individuals liable for the acts of companies whose acts they participate in, even if the person did not know of the details of the plan to conceal ownership).

Judicial application of the Excessive Fines Clause as though it required the employment of criminal sentencing criteria inevitably produces such widely varied results. Such unpredictability would prevent the government

from effectively allocating its resources.[9] It would not be rational to bring a civil action if, after judgment, the State must show criminal intent or criminal sentencing factors in order to prevent nullification of the judgment as excessive. Nor would it be rational for the State to maintain a civil racketeering enforcement unit, or even to begin a single large litigation project, if the trial court could accept all of the State's factual allegations and then nullify the sanction at the time of judgment. Narrowing the set of civil defendants by eliminating those who would not also have been candidates for substantial criminal sentences and by rendering the civil result unpredictable would force the abandonment of "punitive" civil actions as a class. This result is contrary to this Court's deference to legislative judgment concerning appropriate remedies, and to the collective judgment of state and federal legislatures that have dedicated public resources to such civil suits to serve diverse and important public goals since the First Congress. *Bajakajian*, 524 U.S. at 336. This case therefore merits this Court's review.

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[9] *See Bajakajian*, 524 U.S. at 336-37 n. 10, and *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (*de novo* review needed in part to "guide police in the application of the constitutional principle so that they may anticipate the correct result as they enforce the law").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A
[SEAL]

Supreme Court

STATE OF ARIZONA

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PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 542-9396

NOËL K. DESSAINT
CLERK OF THE COURT

September 27, 1999

RE: STATE OF ARIZONA vs. FRANCISCO F. LEYVA/SYLVIA LEYVA
Supreme Court No. CV-98-0538-PR
Court of Appeals No. 1 CA-CV 97-0250
Maricopa County No. CV 90-03498

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 21, 1999, in regard to the above-referenced cause:

ORDERED: State's Petition for Review = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 27th day of September, 1999.

NOEL K. DESSAINT, Clerk

TO:
Hon. Janet A. Napolitano, Attorney General

Attn: Cameron H. Holmes, Esq. and Sandra L. Janzen, Esq. William I. Rothstein, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One
Lexis-Nexis
West Publishing Company

dk

APPENDIX B

The STATE of Arizona, Plaintiff-Appellant,

v.

Francisco F. LEYVA and Sylvia Leyva, husband and wife, Defendants-Appellees.

No. 1 CA-CV 97-0250.

Court of Appeals of Arizona,
Division 1, Department E.

May 19, 1998.

Reconsideration Denied Oct. 22, 1998.

Review Denied Sept. 21, 1999.

Grant Woods, Attorney General by Cameron H. Holmes, Sandra L. Janzen, Assistant Attorneys General, Phoenix, for Appellant.

William Rothstein, Nogales, for Appellees.

OPINION

TOCI, Judge.

¶ 1 After Francisco Leyva pleaded guilty in a criminal action, the state brought this forfeiture proceeding against Francisco and his wife, Sylvia (the "Leyvas"). The trial court imposed a $20,000,000 civil forfeiture judgment against the Leyvas. On appeal, this court found that the $20,000,000 judgment constituted, at least in part, a second punishment in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *See State v. Leyva*, 184 Ariz. 439, 909 P.2d 506

(App.1995) ("*Leyva I*"). On remand, the parties stipulated that double jeopardy was no longer an issue. The only issue remaining was whether the $10,000,000 judgment sought by the state was an excessive fine under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The trial court entered judgment against the Leyvas in the amount of $50,000, finding that any amount in excess of $50,000 would be an excessive fine. The state appeals from this judgment. For reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The facts up to the time of the first appeal appear in detail in *Leyva I*. We therefore set forth a brief statement of the facts prior to *Leyva I* and a brief description of the prior appeal, followed by a more complete discussion of the proceedings following the remand to the trial court.

¶ 3 In 1989, Francisco Leyva was indicted for his involvement in a drug-smuggling organization known as the Somoza Enterprise. In 1990, the state filed a civil forfeiture action against the Leyvas, seeking both *in rem* and *in personam* forfeiture judgments. In 1991, Leyva pleaded guilty to two felonies: conspiracy to commit money laundering and illegally conducting an enterprise. The state then filed a motion for summary judgment in the forfeiture action, which the trial court granted based on the charges to which Leyva pleaded guilty. The trial court eventually entered judgment in the amount of $20,000,000 with interest at the rate of ten percent per year. The Leyvas appealed, raising for the first time the

constitutional issues whether the $20,000,000 forfeiture judgment violated either the Double Jeopardy Clause or the Excessive Fines Clause of the United States Constitution. *See* U.S. Const. amends. V, VIII.

¶ 4 In *Leyva I*, this court began with an analysis of the then-existing precedents from the United States Supreme Court and the Ninth Circuit Court of Appeals. We noted that the Fifth Amendment's Double Jeopardy Clause prohibits multiple punishments for the same offense. We then applied the test set forth by the Ninth Circuit in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir.1994), to determine whether a civil forfeiture action following a criminal conviction is "multiple punishment for the same offense." That test, in turn, was derived from the United States Supreme Court's decisions in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

¶ 5 In applying these precedents, we concluded that the forfeiture ordered by the trial court qualified as "punishment" under the test set forth in *Austin* for determining whether a civil sanction is subject to the limitations of the Excessive Fines Clause. *See Leyva I*, 184 Ariz. at 445, 909 P.2d at 512. We then held, "[i]f a civil forfeiture constitutes punishment for purposes of the Excessive Fines Clause, it is also punishment for purposes of the Double Jeopardy Clause." *Id.* We recognized, however, that the forfeiture arguably served "both remedial and punitive purposes" and therefore remanded the case to the trial court for "further . . . proceedings in light of the developing law in this area" to determine "how much of

the forfeiture is punishment within the meaning of *Halper* and *Austin*." *Id.* at 442, 445, 909 P.2d at 509, 512.

¶ 6 After remand, to eliminate the double jeopardy issue, the state requested summary judgment on counts of the civil complaint for which Leyva had not been convicted. The parties later stipulated that double jeopardy no longer was an issue and that the Somoza Enterprise acquired $10,000,000 in proceeds during the relevant time. The trial court granted the state's motion for summary judgment as to liability and later set the amount of the judgment at $50,000, finding that the $10,000,000 requested by the state would be excessive under the Excessive Fines Clause. Specifically, the court applied the Ninth Circuit's two-pronged test set forth in *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, El Dorado, California*, 59 F.3d 974 (9th Cir.1995) ("*El Dorado*"), for determining whether a fine is excessive.

¶ 7 The state filed a motion for reconsideration, arguing that in *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), the Supreme Court reversed the Ninth Circuit's *$405,089.23* case. According to the state, the trial court erred by relying on *$405,089.23* in holding that $10,000,000 would be an excessive fine. The trial court denied the state's motion and entered its formal judgment of *in personam* forfeiture against the Leyvas in the amount of $50,000. The court also ordered, pursuant to the parties' stipulation, that the properties seized by the state in the forfeiture action be forfeited up to the value of $50,000, with the proceeds to be applied to the *in personam* judgment and any excess to be returned to the Leyvas. The state timely appealed.

II. DISCUSSION

¶ 8 We begin by noting that although the *Ursery* decision reversed the Ninth Circuit's decision in *$405,089.23*, on which this court's decision in *Leyva I* was based, it did not purport to overrule *Austin* and *Halper*, the cases on which the Ninth Circuit's decision was based. The Court in *Ursery* merely explained that the Ninth Circuit had misapplied the cases in holding that a civil forfeiture action following a criminal conviction is multiple punishment for the same offense. The Court noted, "it is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment, as we have understood that term under the Double Jeopardy Clause" and "these *in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." 116 S.Ct. at 2149 (emphasis added).

¶ 9 Thus, *Austin*'s holding that *in rem* civil forfeiture proceedings may serve punitive as well as remedial purposes and that these proceedings are subject to the limitations of the Excessive Fines Clause if they " 'cannot fairly be said *solely* to serve a remedial purpose' " remains valid. 509 U.S. at 621, 113 S.Ct. 2801 (quoting *Halper*, 490 U.S. at 448, 109 S.Ct. 1892). In any event, the parties agree that the Double Jeopardy Clause is not at issue in this appeal; rather, the only issue is whether the trial court properly applied the law to the facts in the record in finding that a forfeiture judgment in any amount over $50,000 would violate the Excessive Fines Clause.

¶ 10 The state asserts that forfeitures pursuant to Arizona Revised Statutes Annotated ("A.R.S.") section

13-2314(D)(6)(a) (Supp.1997)[1] do not constitute "fines" for the purposes of the Eighth Amendment Excessive Fines Clause as described in *Austin*. Thus, according to the state, sanctions imposed under the statute do not require review for "excessiveness." Additionally, the state asserts that even if forfeitures under the Arizona statute constitute fines, the $10,000,000 forfeiture requested in this case is "solely remedial" and therefore does not constitute "punishment" for an offense for Eighth Amendment Excessive Fines Clause purposes. Finally, the state asserts that, assuming review for excessiveness is required, the trial court improperly applied the test in determining what amount would be "excessive" in this case. In response, the Leyvas contend that the trial court applied the appropriate test and that the court's finding that any forfeiture amount over $50,000 would be excessive must be upheld unless it is "clearly wrong."

A. Are Civil Fines Under Arizona's Racketeering Act Subject To Review For Excessiveness?

¶ 11 In *Austin*, the Supreme Court held that the "Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " 509 U.S. at 609-10, 113 S.Ct. 2801 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)). The Court then noted that "civil proceedings may advance punitive as well as remedial

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[1] The state cites to, and the trial court applied, this version of the statute, which was amended in 1994.

goals," and thus, the question in determining whether the Excessive Fines Clause applies is "not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Id.* at 610, 113 S.Ct. 2801.

¶ 12 The Court examined the history of civil forfeiture and concluded that it "historically [has] been understood, at least in part, as punishment." *Id.* at 618, 113 S.Ct. 2801. It next examined the particular statutes at issue to determine whether they were properly considered "punishment." The Court considered several factors in its analysis. First, it noted that neither the statutes nor the legislative history contradicted the historical understanding of forfeiture as punishment. The statutes at issue provided an "innocent owner" defense, thereby focusing the provisions on the culpability of the owner, making them look more like punishment. *Id.* at 619, 113 S.Ct. 2801. Second, the Court noted that the statutorily-authorized forfeitures were tied directly to the commission of drug offenses and that the legislative history confirmed an intention to "deter or punish the enormously profitable trade in dangerous drugs." *Id.* at 620, 113 S.Ct. 2801. Finally, the Court noted that the statutes were not merely remedial because the value of the forfeited assets bore no relation to the costs of law enforcement or damages to society. *Id.* at 621, 113 S.Ct. 2801.

¶ 13 We now apply these factors to Arizona's civil racketeering *in personam* forfeiture statute. *See* A.R.S. § 13-2314. As our courts have recognized, the racketeering forfeiture statute expressly provides that it is intended to be remedial. *In re 2120 S. 4th Ave.*, 177 Ariz. 599, 603, 870 P.2d 417, 421 (App.1994); *Rhue v. Dawson*,

173 Ariz. 220, 233, 841 P.2d 215, 228 (App.1992). Specifically, A.R.S. section 13-2314(L) (Supp.1997) states, "[a] civil action authorized by this section . . . is remedial and not punitive. . . . " Contrary to the state's argument, however, *Ursery* does not hold that the legislature's statement of intent is dispositive, or even the primary factor, in determining whether a statute has a punitive purpose so as to subject it to Excessive Fines Clause analysis.

¶ 14 In *Ursery*, the Supreme Court required that a defendant provide the "clearest proof" that a sanction was so punitive that it transformed what was clearly intended as a civil remedy into a criminal penalty *within the meaning of the Double Jeopardy Clause*. 116 S.Ct. at 2148; *see also State v. Geotis*, 187 Ariz. 521, 523, 930 P.2d 1324, 1326 (App.1996) (citing *Ursery* in requiring "clearest proof" to establish that a forfeiture proceeding is criminal for purposes of double jeopardy analysis). The Court noted, however, that a forfeiture may be subject to review for *excessiveness* under the Eighth Amendment *without* being so punitive that it constitutes punishment for the purposes of the Double Jeopardy Clause. *Ursery*, 116 S.Ct. at 2147. The Court thus distinguished between the proof of punitive purpose needed to bring a statute within the Excessive Fines Clause and the proof of punitive purpose needed to bring a statute within the Double Jeopardy Clause. In the context of the Excessive Fines Clause, the legislature's stated intent is merely one factor to be considered under *Austin*.

¶ 15 Although the state argues, and we agree, that the statute's lack of an "innocent owner" defense weighs in favor of finding that the forfeiture statute is nonpunitive, we find other factors that militate against that

conclusion. For example, A.R.S. section 13-2314(D)(6)(a) provides for the forfeiture of property "acquired or maintained by a person in violation of § 13-2312." Section 13-2312 (Supp.1997) makes it a felony to control or conduct an enterprise through racketeering, which is defined as:

> [A]ny act, including any preparatory or completed offense, which is committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, which would be chargeable or indictable under the laws of this state had the act occurred in this state and which would be punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving [certain listed crimes].

A.R.S. § 13-2301(D)(4) (Supp.1997). Thus, forfeiture is tied directly to the commission of criminal offenses, a factor weighing in favor of finding a punitive intent. *See Austin*, 509 U.S. at 620 ("[C]ongress has chosen to tie forfeiture directly to the commission of drug offenses."); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (tax on dangerous drugs was actually punishment under the Double Jeopardy Clause because it was levied only on those charged with commission of drug crime).

¶ 16 Additionally, the state submitted voluminous documents to the trial court to prove that enforcement pursuant to the statute is essential to the state's efforts to combat criminal racketeering activities. This recognition that the "traditional criminal sanctions of fine and

imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs," *Austin*, 509 U.S. at 620, 113 S.Ct. 2801, is another factor weighing in favor of a finding that the statute has some punitive purpose.

¶ 17 The state also argues that forfeiture under section 13-2314(D)(6)(a) is remedial because it often may operate to prevent crime, not to punish past conduct, as evidenced by cases which have upheld forfeiture based on conduct that would not have been punishable as a crime. *See, e.g., 1972 Chevrolet Monte Carlo v. State*, 117 Ariz. 461, 573 P.2d 535 (App.1977) (upholding forfeiture of vehicle containing non-useable amount of marijuana seeds and debris); *$10,098.00 in U.S. Currency v. Dimitriou*, 175 Ariz. 237, 854 P.2d 1223 (App.1993) (affirming forfeiture of cash *intended* for use, but not actually used, to violate relevant statute). Although this argument may support the proposition that the forfeiture statute is not intended *solely* to punish,[2] it does not prove that the forfeiture statute is intended *solely* for remedial purposes. Just as some cases uphold forfeiture based on conduct that may not be punishable under the criminal code, others have upheld forfeiture based on conduct for which defendants already had been convicted and sentenced. The mere fact that the statute is drafted broadly enough to encompass both types of cases does not mean there is no punitive intent.

---

[2] It could, alternatively, support an argument that the racketeering statute is used to punish those "wrongdoers" who are not punishable under the criminal code.

¶ 18 The state also asserts that the statute is not "punitive" because the forfeitures are "structured" as a civil compensatory remedy, rather than as a punishment commensurate with the defendant's culpability. This argument does not, however, prove that the *sole* intent is remedial. As the Court in *Austin* noted, "dramatic variations in the value of conveyances and real property" undercut any argument that forfeiture of those items is "a reasonable form of liquidated damages." 509 U.S. at 621, 113 S.Ct. 2801. In this case, the state seeks to recover "*in personam* forfeiture" of the Leyvas' interest in "[a]ny property or interest in property acquired or maintained by the person in violation of § 13-2312." *See* A.R.S. § 13-2314(D)(6)(a). This claim differs from that in cases such as *One Lot Emerald Cut Stones v. United States*, in which the claimed penalty is directly related to the damages caused by the activity leading to the forfeiture. 409 U.S. 232, 233 n. 2, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (statute at issue required forfeiture of the illegally-imported item and payment of a penalty equal to the value of the article).

¶ 19 Additionally, the state asserts that the Leyvas are subject to joint and several liability under A.R.S. section 13-2314(E) (Supp.1997), which provides:

> A person who is liable for conduct described in subsection (D), paragraph 6, subdivision (a), (b) or (c) of this section is liable for the total value of all interests in property described in those subdivisions. The court shall enter an order of forfeiture against the person in the amount of the total value of all those interests less the value of any interests that are forfeited before or at the time of the entry of the final judgment.

Thus, the state essentially seeks a judgment against the Leyvas for a sum of money equal to the value of any property which any of the persons involved in the Somoza Enterprise ever acquired or maintained in violation of the racketeering statutes. *See* A.R.S. § 13-2314(D)(6)(a). Such a forfeiture has " 'absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.' " *Austin*, 509 U.S. at 621, 113 S.Ct. 2801 (quoting *United States v. Ward*, 448 U.S. 242, 254, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Rather, the forfeiture appears designed, *at least in part*, to punish the Leyvas for their criminal involvement in the Somoza Enterprise.

¶ 20 Furthermore, as Justice Scalia recognized in his concurring opinion in *Austin*, *in personam* forfeitures generally are designed as "assessments, whether monetary or in kind, to punish the property owner's criminal conduct," while *in rem* forfeitures generally are designed as "confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." 509 U.S. at 624, 113 S.Ct. 2801. Thus, *in personam* forfeitures generally appear in the criminal forfeiture context, while *in rem* forfeitures generally are civil in nature. Arizona's statutes appear to be unique in providing for civil *in personam* forfeitures, which is another indication of at least some punitive purpose.

¶ 21 Finally, the state asserts that A.R.S. section 13-2314(D)(6)(a), by its terms, seeks to recover only illegal items and/or "proceeds" of crime and that because these things are illegal to possess, the statutes are therefore "purely remedial." The state argues that the profits of crime are "dangerous or illegal" and therefore subject to

seizure, much like the guns in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), or the smuggled goods in *Emerald Cut Stones*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438. *See also $10,098.00*, 175 Ariz. 237, 854 P.2d 1223 (upholding forfeiture of funds used in "reverse buy" operation).

¶ 22 The statute at issue here, however, as well as the forfeiture order issued by the trial court, provide not only for *in rem* forfeiture, but also for *in personam* forfeiture of assets and joint and several liability. Thus, the statute does not limit the state to the confiscation of illegal or dangerous items and property or funds directly traceable to a crime. The forfeiture statute also allows the state to essentially seek a judgment that the Leyvas are jointly and severally liable for all of the profits earned by any and all members of the entire Somoza Enterprise during a specified period, regardless of whether the Leyvas possess or ever have possessed such "proceeds." The scope of the provision indicates it is not seeking to remedy an immediate danger, but to punish persons who have engaged in criminal activity.

¶ 23 " '[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " *Austin*, 509 U.S. at 621, 113 S.Ct. 2801 (quoting *Halper*, 490 U.S. at 448, 109 S.Ct. 1892). Because several of the factors point to a finding that Arizona's forfeiture statute serves not only a remedial purpose, but also a deterrent or retributive purpose, we conclude that forfeiture under this statute constitutes " 'payment to a

sovereign as punishment for some offense,' " and therefore is subject to the limitations of the Excessive Fines Clause. *See Austin*, 509 U.S. at 622, 113 S.Ct. 2801 (quoting *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. 2909).

B. The Excessive Fines Test

¶ 24 The parties apparently agree that the correct test for "excessiveness" under the Eighth Amendment Excessive Fines Clause is set forth in *El Dorado*, 59 F.3d 974, although the state asserts the test must be "adjusted" in light of *Ursery* and *Bennis v. Michigan*, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996). In *El Dorado*, the Ninth Circuit described a two-pronged approach to determining whether a forfeiture of property constitutes an excessive fine: first, the property forfeited "must have been an 'instrumentality' of the crime (a 'nexus' must exist between the property and the offense);" and second, "the worth of the property must be 'proportional' (not excessive) to the culpability of the owner." *El Dorado*, 59 F.3d at 982. Here, the trial court stated in its November 14, 1996 minute entry that it applied the *El Dorado* test.

¶ 25 The state asserts that even if the forfeiture statute is subject to the limitations of the Eighth Amendment, forfeitures of proceeds that are directly traceable to an illegal enterprise are not subject to the excessive fines analysis at all. *See, e.g., United States v. Alexander*, 108 F.3d 853, 855 (8th Cir.1997). To the extent that the "proceeds" at issue are the fruits or profits of the defendant's own crime, we agree. The state, however, has urged a broad definition of "proceeds" in this case, which would include profits of crimes committed by others and never

received by the Leyvas, but for which they would be jointly and severally liable under the requested *in personam* judgment. If these are "proceeds," then they are subject to the excessive fines analysis.

¶ 26 The state next asserts that, in "proceeds" forfeiture cases, *Bennis* requires that the proportionality should be between the forfeiture and the actual or potential injury to the state, rather than between the forfeiture and the culpability of the claimant. 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68. *Bennis*, however, was purely an *in rem* proceeding, in which the owner of the property did not face liability in excess of the value of the property involved in the offense. Where the state has defined "proceeds" broadly and seeks an *in personam* forfeiture of the sort involved in this case, which could lead to joint and several liability for a substantial amount of money, the trial court does not err in considering the culpability of the claimant. *See Alexander*, 108 F.3d at 855, 857 (addressing criminal *in personam* forfeiture).

1. The Instrumentality Test

¶ 27 Under the instrumentality or nexus prong of the *El Dorado* test, "the initial inquiry is whether the property (or the assets for which it has been exchanged in whole or in part) has a close enough relationship to the offense to permit its confiscation to any extent." 59 F.3d at 982. The "burden is on the government to show a substantial connection between the property and the offense." *Id.* at 985.

¶ 28 Here, the property the state sought to forfeit included any and all assets that the Leyvas possessed or

may ever possess, up to a value of $10,000,000. The trial court stated in its minute entry that because the state did not seek an *in rem* judgment against the Leyvas, the instrumentality test does not apply. Because the Leyvas have not objected to the trial court's decision not to apply the instrumentality test, we do not consider whether it applies in the context of the *in personam* forfeiture at issue here. We will instead focus on the trial court's application of the proportionality test.

2. The Proportionality Test

¶ 29 If there is a substantial connection between the property, or a portion of the property, and the offense "then the claimant has the burden to show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability." *Id.*

¶ 30 In determining proportionality, the court explained that the trial court, while "bearing in mind any *in personam* punishment of the owner," should consider the following factors "in determining the *harshness of the forfeiture:*"

> (1) the fair market value of the property;
>
> (2) the intangible, subjective value of the property, e.g., whether it is the family home; and
>
> (3) the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition.

Id. Additionally, in determining the *culpability* of the owner, the trial court should consider the following factors:

> (1) whether the owner was negligent or reckless in allowing the illegal use of his property; or
>
> (2) whether the owner was directly involved in the illegal activity, and to what extent; and
>
> (3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community.

Id. at 986.

¶ 31 Finally, if the property was an instrumentality of the crime, but the forfeiture appears to be an excessive fine, the forfeiture may be limited "to an appropriate portion or the more poisonously tainted portion of the property." *Id.* at 986-87.

¶ 32 The state asserts that the finding required under the Eighth Amendment is a constitutional determination regarding the limits of statutory liability, not an "expression of preference within the discretionary purview of a sentencing court." While we agree that the forfeitures provided for by the racketeering statute must be enforced except to the extent that they are unconstitutional, the trial court is nevertheless in the best position to evaluate the evidence submitted and determine what is "excessive" in light of all the facts. We therefore will defer to the trial court's fact finding as long as there is evidence in the record to support it, and we will accord deference to the trial court's decision regarding the constitutional limits of the forfeiture absent clear error.

¶ 33 In its minute entry order, the trial court found:

> [T]he Somoza Enterprise had at least 14 marijuana distributors and received millions of dollars in proceeds from the sale of marijuana. Although Defendant's primary role was handling money for the Somoza Enterprise, he did not keep all of those proceeds and he was just one of the many people whose participation made the Somoza Enterprise as large and as successful as it was.
>
> Considering the number of people who participated in the Somoza Enterprise and Defendant's role in it, an award of the total amount that the parties agree was the proceeds from 1987 to 1989 [$10,000,000] is excessive. It is not proportional to the Defendant's culpability. Additionally, the Court of Appeals indicated that a $20 million judgment would be punitive because 'it takes from the Leyvas all non-exempt property they legally own or presumably would own . . . it is the Leyvas' lifetime indenture to the State of Arizona.' The same is true of a $10 million dollar judgment. It would likely mean a lifetime indenture to the State. In light of the fact that the State is seeking an *in personam* judgment for an amount far in excess of any amount that they allege Leyva himself received from this enterprise, an *in personam* award of $10 million is unduly harsh.

(Citation omitted.)

¶ 34 In the formal order granting judgment, the trial court made additional detailed findings regarding the illegal activities of the Somoza Enterprise, including that the Somoza Enterprise earned $157,000,000 in proceeds from marijuana sales from 1987 to 1989; that the Enterprise used millions of dollars in proceeds to corrupt the

judicial and law enforcement community in Mexico; and that Leyva was a "core member of the Somoza Enterprise . . . [although] he was only one of a number of members."

¶ 35 Based on these findings, it appears that the trial court considered all of the relevant factors in applying the proportionality test. The state, however, asserts that the Leyvas submitted insufficient evidence to support a finding that a $10,000,000 judgment would be "unduly harsh."[3] As support for this assertion, the state points to the trial court's finding, set forth in the form of judgment submitted by counsel for the state, that "[n]o evidence was presented concerning how the defendants are paying their bills. No evidence relating to [Francisco Leyva's] net worth was presented."

¶ 36 We note, however, that the record contains an affidavit submitted by Francisco Leyva, in which he alleged that he had been "selling items of personal property in order to survive." In this affidavit, Leyva listed various items of personal property he owned, with his estimate of their values, as well as several debts and his monthly expenses. Leyva did not attempt to state his "net worth" in the affidavit, nor did he state that the assets and debts listed were the only assets he owned or the only debts he owed. Other than the evidence related to the assets seized by the state (and the settlement regarding the Leyvas' home), we have found no other evidence

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[3] The state elsewhere argues that the Leyvas' ability to pay is not a valid factor for consideration. In adopting the Ninth Circuit's *El Dorado* test, which includes a determination of the hardship to the defendant, we reject that argument.

of the Leyvas' assets or net worth in the record. Although it is not a model of clarity, we nevertheless believe that the affidavit permits the inference that the assets and debts listed were the Leyvas' only substantial existing assets and debts and provides adequate information from which the trial court could find, in combination with the other factors of the proportionality test, that a $10,000,000 *in personam* forfeiture judgment would be unduly harsh.

III. CONCLUSION

¶ 37 The trial court considered all of the appropriate factors in assessing whether the *in personam* forfeiture requested by the state was excessive within the meaning of the Excessive Fines Clause. We find no error in the trial court's decision to limit the amount of the *in personam* forfeiture to $50,000. We therefore affirm the trial court's judgment.

CONCURRING: JAMES B. SULT, Presiding Judge, and THOMAS C. KLEINSCHMIDT, Judge.

APPENDIX C

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, v. FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife, et al., Defendants.	No. CV90-03498 **ORDER OF *IN PERSONAM* FORFEITURE JUDGMENT AGAINST FRANCISCO FRANCO LEYVA, SYLVIA LEVYA AND THEIR MARITAL ESTATE** (Filed March 18, 1997)

The court having previously entered a judgment of liability against the Defendants pursuant to the State's two Motions for Summary Judgment, and the matter having been remanded for a determination with respect to the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment, and

having reviewed the pleadings of record including the Fact Memoranda of the Parties and the affidavits of Ron Gomez and Sandra Schwartz, and having conducted hearings in this matter, and good cause appearing, the Court enters the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. The court incorporates the findings of fact in its order granting summary judgment dated April 6, 1993 and its order dated November 14, 1996; the facts set forth in the State's Fact Memorandum dated September 6, 1996; the Correction to the State's Fact Memorandum dated September 18, 1996; the Supplemental Affidavit regarding Proceeds of the Somoza Enterprise dated September 18, 1996; the Defendant's memorandum of Facts dated September 10, 1996; the Defendant's hearing Memorandum dated September 16, 1996; and the Stipulation between the parties regarding the Proceeds Acquired by the Somoza Enterprise dated September 20, 1996.

2. The Somoza enterprise was a multi-million dollar drug organization engaged in the importation, transportation, and sale of marijuana.

3. The Somoza enterprise distributed ton quantities of marijuana on a weekly basis; each ton producing one (1) million dollars in proceeds at a wholesale market price of $500 a pound.

4. The Somoza enterprise had five marijuana farms during the years 1987 through 1989, each farm capable of producing 40 tons of raw harvested marijuana, which in

turn yields 20 tons of processed, saleable marijuana. Five farms annually produce $100 million in marijuana proceeds. (Five farms x 20 tons at $500 a pound)

5. One hundred forty two and one-half (142.5) tons of marijuana were seized from the Somoza enterprise from 1987 through 1989.

6. The proceeds acquired by the Somoza enterprise between January 1987 and December 1989 are $157 million. The court arrives at this figure by subtracting the value of the seized tons of marijuana ($142.5 million) from the production of the five marijuana farms over three years. (3 x $10 million = $300 million).

7. The Somoza organization had no less than fourteen (14) distributors; one distributor sold between 18 and 25 million dollars worth of marijuana between 1984 and 1989.

8. Millions of dollars in marijuana proceeds were counted by the enterprise.

9. Millions of dollars in marijuana proceeds were used to corrupt the judicial and law enforcement community in Mexico.

10. Francisco Franco Leyva (hereafter Leyva) was a core member of the Somoza enterprise between January 1987 and December 1989, but he was only one of a number of members.

11. Leyva's primary role in the Somoza enterprise was to participate in the management and direction of the financial affairs of the enterprise.

12. Leyva himself collected proceeds from the sale of marijuana in the amount of no less than $1.4 million.

13. Leyva had control over the marijuana proceeds on deposit at Banco Del Atlantico, which contained no less than one (1) million dollars. Leyva had the keys to the safe deposit box containing the marijuana proceeds.

14. After Somoza was arrested, Leyva brought $10,000 to Somoza, who was in prison, and participated in a meeting which included two Colombians who desired to coordinate their cocaine business with Somoza.

15. Leyva was integrally involved in arranging for a $1.2 million bribe to a Mexican Federal Judicial Police Commandant in October 1989 in order to secure the release of a portion of 40 tons of seized marijuana.

16. Leyva paid expenses of the Somoza enterprise with marijuana proceeds.

17. Leyva has stipulated that the Somoza enterprise acquired no less than $10 million in proceeds from the sale of marijuana between January 1987 and December 1989.

18. In the companion criminal case, Leyva plead to Count II, Conspiracy to Commit Money Laundering and Count VIII, Illegally Conducting an Enterprise.

19. In the civil case, judgment of liability is based on Illegally Conducting an Enterprise and Conspiracy to Illegally Conduct an Enterprise, based on the Second and Third Claim for Relief in the civil complaint.

20. The parties have stipulated that double jeopardy is not an issue and that the defendants are jointly and

severally liable. See the Stipulation of the parties and the State's Legal Memorandum, both dated September 20, 1996.

21. Leyva has been employed in various jobs from 1977 through June 1996 but is presently unemployed, Sylvia Leyva has been unemployed for a number of years. The Leyvas' monthly living expenses are $1230.00. No evidence was presented concerning how the defendants are paying their bills. No evidence relating to his net worth was presented. His net worth is unknown.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the Defendants.

2. A.R.S. § 13-2314(D)(6)(a) is an *in personam* forfeiture which provides for the forfeiture of any property acquired by the person in violation of A.R.S. § 13-2312.

3. A group of persons constituting an illegal enterprise conspired to associate in fact between January 1987 and December 1989 and conspired to conduct the affairs of the enterprise through racketeering in violation of A.R.S. § 13-2312.

4. Property as used in A.R.S. § 13-2314(D)(6)(a) includes the proceeds acquired by the Somoza enterprise from the sale of marijuana.

5. A.R.S. § 13-2312 was violated by Leyva in two ways: Illegally Conducting an Enterprise and Conspiracy to Illegally Conduct an Enterprise.

6. Leyva was an active member of the Somoza enterprise between January 1987 and December 1989 and

conspired to conduct the Somoza enterprise through racketeering during the same period.

7. The Defendants *in personam* affected by this judgment are Francisco Franco Leyva individually, Sylvia Leyva only as a member of the marital community with Francisco Franco Leyva and their marital community.

8. The Court's judgment of liability is based on the reasons set forth in the two previous Motions and Orders for Summary Judgment.

9. The application of A.R.S. § 13-2314(D)(6)(a) to the facts of this case mandates a judgment of no less than $10 million, subject to any constitutional provisions which would reduce the judgment.

10. The legislative intent of A.R.S. § 13-2314 is remedial, as stated in A.R.S. § 13-2314(L).

11. No evidence was presented that indicates that the purpose or effect of A.R.S. § 13-2314 is punitive.

12. Cases such as *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), holding that an *in personam* forfeiture judgment of over $130 million does not violate the Eighth Amendment are wrongly decided because they are contrary to the conclusions of the Court of Appeals in *Leyva*, 184 Ariz. 439, 909 P.2d 506 (App. 1995), based on *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *reversed sub nom. United States v. Ursery*, 116 S.Ct. 2135 (1996).

13. A judgment of $50,000 is remedial and does not constitute punishment.

14. A judgment of any amount over $50,000 would constitute punishment prohibited by the Excessive Fines Clause of the Eighth Amendment.

15. In making this determination the court is required by the Eighth Amendment to consider:

a. the nature of the defendant's personal culpability – as reflected by his role in the enterprise – apart from his civil liability;

b. the number of people who participated in the Somoza Enterprise, and

c. the defendant's ability to pay as determined by the defendant's present salary and income, which in this case would work a lifetime indenture.

16. The *in rem* properties seized by the State and listed in Appendix A, to which the defendants filed a claim, are forfeitable up to the value of $50,000, pursuant to stipulation of the parties.

ORDER

BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. An *in personam* forfeiture judgment is entered against Francisco Franco Leyva, individually, against Sylvia Leyva, as a member of the marital community with Francisco Franco Leyva and against the Leyva marital community, in the amount of $50,000 with interest pursuant to A.R.S. § 44-1201 thereon at the rate of 10 percent

(10%) *per annum* until paid. This civil judgment is collectible to the same extent as any other civil judgment subject to all applicable provisions of law concerning execution.

2. The *in rem* properties seized by the State and listed in Appendix A and to which the defendants filed a claim, are forfeited up to the value of $50,000, and the proceeds shall be applied to the *in personam* judgment.

3. All such property forfeited and all monies collected pursuant to this judgment shall be disposed of in conformance with A.R.S. § 13-4315:

a) If property is sold, the net proceeds of the Defendants' interest shall be credited to the *in personam* judgment.

b) If property is retained for official use, the fair market value of the Defendants' property interests at the date of the order shall be credited to the *in personam* judgment.

4. Pursuant to Rule 54(b) of the Rules of Civil Procedure, the Court has determined that there is no just reason for delay and it is therefore directed that final judgment as provided herein shall be entered forthwith.

5. Jurisdiction is retained by this court for the purpose of entertaining applications for the enforcement of this judgment.

DONE IN OPEN COURT this 18th day of March, 1997.

/s/ Jeffrey S. Cates
Honorable Jeffrey S. Cates
Judge of the Maricopa
County Superior Court

ORIGINAL lodged this 20th day
of February, 1997, with:

THE HONORABLE JEFFREY S. CATES
Judge of the Superior Court-Maricopa County
201 West Jefferson, 13E
Phoenix, Arizona 85003

COPY of the foregoing mailed/hand-delivered
this 20th day of February, 1997, to:

WILLIAM ROTHSTEIN
545 N. Grand, #4
Nogales, Arizona 85621-2728

/s/ Sandi Colter

APPENDIX A

15) Residential property known as 545 Western Avenue, Nogales, Arizona, parcel #101-25-160, Santa Cruz County.

Lot 62 in Block 114 of the Partial Subdivision of Blocks 113, 113A, 114, 114A and 115 of Northern Addition to the City of Nogales, as Amended and Augmented, according to the Map thereof recorded July 20, 1938 in the Office of the County Recorder of Santa Cruz County, Arizona. Subject to taxes subsequent to the year 1978.

Reservations in the Patent from the United States of America recorded January 16, 1905 in Book 3 of Deeds at Page 303 conveying caption and more land as follows: And there is reserved from the lands hereby granted a

right of way thereon for ditches or canals constructed by the authority of the United States.

39)	Vehicle Description:	1979 Volkswagen 2-door
	VIN:	1592030121
	Arizona License:	EJL928
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona
40)	Vehicle Description:	1988 Ford Bronco
	VIN:	1FMEU15N2JLA09606
	Arizona License:	EHJ052
	Registered Owner:	Francisco Franco Leyva
	Address:	545 Western Avenue Nogales, Arizona
41)	Vehicle Description:	1981 Chevrolet 1/2 ton Pickup Truck
	VIN:	1GCEK14H6BS159232
	Arizona License:	8866AJ
	Registered Owner:	Francisco Franco Leyva
	Address:	545 Western Avenue Nogales, Arizona
42)	Vehicle Description:	1975 Ford Coupe
	VIN:	5A30H117136
	Arizona License:	BHK985
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona
43)	Vehicle Description:	1975 Chevrolet Station wagon
	VIN:	CKM185F146866
	Arizona License:	AJK940
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona

44)	Vehicle Description:	1977 Chevrolet 1/2 ton Van
	VIN:	1GCDG15H1H7151319
	Arizona License:	3WS109
	Registered Owner:	Francisco F. Leyva
	Address:	1301 Grand Avenue Nogales, Arizona

88) Lot 193 Meadow Hills Estates Unit No. 5, vacant land known as parcel #113-48-193, Santa Cruz County. Further described as Lot 193 MEADOW HILLS ESTATES UNIT NO. 5, a subdivision of Santa Cruz County, Arizona, of record in the office of the Santa Cruz County Recorder in Book 4 of Maps and Plats at page 40.

89) Lot 58 Lake Patagonia Ranch, Unit II, vacant land known as parcel #106-06-077. Further described as Lot 58 Lake Patagonia Ranch, Unit II, Book 4 Page 29.

95) Property seized from 545 Western Avenue, Nogales, Arizona.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, v. FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife, et al., Defendants.	No. CV90-03498 **SUBSTITUTION OF APPENDIX A** (Hon. Jeffrey S. Cates) (Filed March 4, 1997)

Please substitute the attached Appendix A to the proposed Order of *In Personam* Judgment. The new Appendix A deletes Item 15 from the execution of the judgment.

RESPECTFULLY SUBMITTED this 4th day of March, 1997.

GRANT WOODS
Attorney General

By Sandra L. Janzen
SANDRA L. JANZEN
Assistant Attorney General
Attorneys for the STATE

ORIGINAL filed this 4th day
of March, 1997, with:

CLERK OF THE SUPERIOR COURT
Maricopa County
201 West Jefferson
Phoenix, Arizona 85003

COPY of the foregoing hand-delivered
this 4th day of March, 1997, to:

THE HONORABLE JEFFREY S. CATES
Judge of the Superior Court-Maricopa County
201 West Jefferson, 13E
Phoenix, Arizona 85003

COPY of the foregoing mailed
this 4th day of March, 1996, to:

WILLIAM ROTHSTEIN
545 N. Grand, #4
Nogales, Arizona 85621-2728

/s/ Sandi Cotter

APPENDIX A

39)	Vehicle Description:	1979 Volkswagen 2-door
	VIN:	1592030121
	Arizona License:	EJL928
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona
40)	Vehicle Description:	1988 Ford Bronco
	VIN:	1FMEU15N2JLA09606
	Arizona License:	EHJ052
	Registered Owner:	Francisco Franco Leyva
	Address:	545 Western Avenue Nogales, Arizona
41)	Vehicle Description:	1981 Chevrolet 1/2 ton Pickup Truck
	VIN:	1GCEK14H6BS159232
	Arizona License:	8866AJ
	Registered Owner:	Francisco Franco Leyva
	Address:	545 Western Avenue Nogales, Arizona
42)	Vehicle Description:	1975 Ford Coupe
	VIN:	5A30H117136
	Arizona License:	BHK985
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona
43)	Vehicle Description:	1975 Chevrolet Station wagon
	VIN:	CKM185F146866
	Arizona License:	AJK940
	Registered Owner:	Francisco F. Leyva
	Address:	545 Western Avenue Nogales, Arizona

44) Vehicle Description: 1977 Chevrolet 1/2 ton Van
VIN: 1GCDG15H1H7151319
Arizona License: 3WS109
Registered Owner: Francisco F. Leyva
Address: 1301 Grand Avenue
Nogales, Arizona

88) Lot 193 Meadow Hills Estates Unit No. 5, vacant land known as parcel #113-48-193, Santa Cruz County. Further described as Lot 193 MEADOW HILLS ESTATES UNIT NO. 5, a subdivision of Santa Cruz County, Arizona, of record in the office of the Santa Cruz County Recorder in Book 4 of Maps and Plats at page 40.

89) Lot 58 Lake Patagonia Ranch, Unit II, vacant land known as parcel #106-06-077. Further described as Lot 58 Lake Patagonia Ranch, Unit II, Book 4 Page 29.

95) Property seized from 545 Western Avenue, Nogales, Arizona.

APPENDIX D

STATE of Arizona, Plaintiff-Appellee,

v.

Francisco F. LEYVA and Sylvia Leyva, husband and wife, Defendants-Appellants.

No. 1 CA-CV 93-0281.

Court of Appeals of Arizona, Division 1, Department E.

Dec. 28, 1995.

Grant Woods, the Attorney General by Cameron H. Holmes and Sandra L. Janzen Assistant Attorneys General, Phoenix, for Plaintiff-Appellee.

William Rothstein, Nogales, for Defendants-Appellants.

OPINION

NOYES, Judge.

Defendants ("the Leyvas") challenge a $20,000,000 (TWENTY MILLION DOLLAR) civil forfeiture judgment the State obtained against them following Francisco Leyva's guilty plea in a separate criminal action. Defendants argue that the judgment violates the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. We agree, in part, and we remand for further litigation on those issues.

This opinion replaces *State v. Leyva*, 199 Ariz.Adv.Rep. 18 (App. September 12, 1995), which we vacated on November 16 after granting the State's motion

for reconsideration. The motion convinced us that the September 12 opinion was overbroad, and erred by ordering dismissal of the complaint. In this revised opinion we interpret *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), to require remand, not dismissal, on the double jeopardy issue. We also follow *Austin v. United States,* 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and remand on the excessive fines issue.

I

In 1989 Francisco Leyva was indicted for his alleged involvement in a drug-smuggling organization headed by Jose Luis Somoza. In 1990 the State filed a civil forfeiture action against Leyva and his wife, seeking an in personam forfeiture judgment based on the conduct for which Leyva was indicted. Both actions involved numerous co-defendants; this appeal involves only the Leyvas and the civil forfeiture action against them.

In 1991 Leyva pleaded guilty to two felonies: conspiracy to commit money laundering in violation of Arizona Revised Statutes Annotated ("A.R.S.") sections 13-1003 and 13-2317 (1989), and illegally conducting an enterprise in violation of A.R.S. section 13-2312 (1989). Leyva's wife was not indicted. In the written factual basis for the guilty pleas, Leyva admitted that from 1987 through 1989 he "assisted in the management and direction of the financial affairs" of the Somoza organization by "accepting drug proceeds on the premises of Pancho's Liquors and elsewhere on behalf of the Somoza enterprise" and by using those proceeds to pay expenses as directed by Somoza. One of those expenses was a million dollar bribe

paid to members of the Mexican Federal Judicial Police in October 1989 for release of a Somoza marijuana field they had seized and three Somoza employees they had arrested.

Leyva's plea agreement included the stipulation that he pay a fine and surcharge totalling $20,550 "as and for the costs of criminal investigation and prosecution of this matter." At sentencing, Leyva was placed on probation for five years, with conditions that included nine months in jail and the stipulated fine. After sentencing, the State filed a motion for summary judgment in the civil action, reasoning that "Francisco Franco Leyva pled guilty in the companion criminal matter, CR 89-12526, thereby making himself personally and his marital community civilly liable in this action, CV90-03498." The State cited A.R.S. section 13-2314(G) (1989) (renumbered as section 13-2314(H) (Supp.1995)), which precludes a defendant "from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding."

The State's evidentiary theory to support a $20 million judgment was that "the gain made by the Somoza enterprise, based only on the seizures described within the complaint, is at least 20 million dollars." Ninety percent of this "gain" was based on the State's allegation that the Somoza marijuana field seized by Mexican police in 1989 had a 40-ton crop that, when harvested and processed, would yield 36,000 pounds of marijuana for importation into the United States with a total value of $18 million. The rest of the "gain" was the million dollar bribe, plus various smaller seizures of money and drugs totalling another million dollars. The State reasoned that

because the Somoza organization had this gain, and because Leyva was a member of this organization, the State was entitled to a $20 million in personam judgment against Leyva and his wife pursuant to A.R.S. section 13-2314(D)(6)(a) (Supp.1995). (We have doubts about basing the amount of an in personam forfeiture judgment on the value of property already seized by governmental agencies, but that is not an issue on appeal.)

The Leyvas filed no opposition to the motion for summary judgment, and the trial court granted it in September 1992. After entry of summary judgment the Leyvas argued that they had not opposed it only because they "thought the matter had settled," and they made various efforts to have the judgment set aside, all of which were denied. In April 1993 the court entered formal judgment, which included the following orders:

> 1. An in personam forfeiture judgment is entered against Francisco Franco Leyva, individually, against Sylvia Leyva, as a member of the marital community with Francisco Franco Leyva and against the Leyva marital community, in the amount of $20 million with interest pursuant to A.R.S. § 44-1201 thereon at the rate of ten percent (10%) per annum until paid.
>
> 2. All property of Francisco Franco Leyva, and all property of the marital community of Francisco Franco Leyva and Sylvia Leyva is forfeited to the State until the in personam forfeiture judgment is satisfied, subject to all applicable provisions of law concerning execution.
>
> 3. The property interests of Francisco Franco Leyva and the marital community of Francisco Franco Leyva and Sylvia Leyva in the property

listed in Appendix A are forfeited to the State of Arizona. No other property interests in the property listed in Appendix A are forfeited pursuant to this order. [Appendix A listed a parcel of commercial property, a residence, a 1979 Volkswagen, a 1988 Ford, a 1981 Chevrolet pickup truck, a 1975 Ford, a 1975 Chevrolet, two parcels of vacant land, unspecified property seized from the residence, and $24,606.85 in the Pancho's Liquor's bank account.]

. . . .

5. All property collected pursuant to this judgment shall be disposed of in conformance with A.R.S. § 13-4315:[1]

a) If property is sold, the net proceeds of the Defendants' interest shall be credited to the in personam judgment.

b) If property is retained for official use, the fair market value of the Defendants['] property

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[1] A.R.S. section 13-4315 (Supp.1995) provides, in part:

A. Any property . . . forfeited to the state under this title shall be transferred as requested by the attorney for the state to the seizing agency or to the agency or political subdivision employing the attorney for the state. . . .

B(1). If the property forfeited is money, . . . the court shall [order payment of costs of investigation and prosecution] and shall order all excess monies remaining after such returns deposited in the anti-racketeering fund of this state or of the county in which the political subdivision seizing the monies or prosecuting the action is located, established pursuant to § 13-2314.01 or 13-2314.03.

interests at the date of the order shall be credited to the in personam judgment.

6. Jurisdiction is retained by this court for the purpose of entertaining applications for the enforcement of this judgment.

The Leyvas filed a timely notice of appeal. This Court has jurisdiction pursuant to A.R.S. section 12-2101(B) (1994).

The constitutional issues raised by the Leyvas on appeal were not presented to the trial court. Generally, this Court will review an issue only if the parties first presented it to the trial court. *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 518, 869 P.2d 183, 194 (App.1993). This rule is procedural, not jurisdictional, and its purpose is to facilitate the "orderly administration and attainment of justice." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086, *cert. denied*, 484 U.S. 874, 108 S.Ct. 212, 98 L.Ed.2d 177 (1987). Although issuing, then vacating, then reissuing an opinion proves the wisdom of the general rule that issues should not be considered for the first time on appeal, we continue to believe that the constitutional issues raised in this appeal are of such importance that they should be addressed. The parties agree and have fully briefed those issues. To the extent that the facts are insufficiently developed for our decision of the issues, we remand for further trial court proceedings in light of the developing law in this area.

II

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "twice put in jeopardy of

life or limb" for the same violation of the law. U.S. Const. amend. V. This protection safeguards an individual against three distinct abuses: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440, 109 S.Ct. at 1897. The Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969); *Taylor v. Sherrill*, 169 Ariz. 335, 338, 819 P.2d 921, 924 (1991) (citing *Benton v. Maryland*, 395 U.S. at 794, 89 S.Ct. at 2062). Article 2, section 10 of the Arizona Constitution contains a Double Jeopardy Clause, and neither party argues that it has a different meaning than its federal counterpart.

This case involves the protection against "multiple punishments for the same offense." Whether a civil forfeiture action following a criminal conviction is multiple punishment for the same offense depends on two factors: whether the forfeiture action and the criminal action were "separate proceedings," and whether the forfeiture constitutes "punishment." *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir.1994). In this case, the answer to both questions is yes.

We summarily dispose of the "separate proceedings" issue. The Ninth Circuit has held that a civil forfeiture action and a criminal action are separate proceedings when, as in this case, they involve the same conduct but are instituted at different times, tried before different fact finders, presided over by different judges, and resolved by separate judgments. *Id.* The Eleventh and Second Circuits would disagree. *See United States v. 18755 N. Bay Rd.*,

13 F.3d 1493, 1499 (11th Cir.1994); *United States v. Millan*, 2 F.3d 17, 20 (2d Cir.1993), cert. denied, 510 U.S. 1092, 114 S.Ct. 922, 127 L.Ed.2d 215 (1994). We find the $405,089.23 case persuasive and will follow the Ninth Circuit on this issue, as we did in *Marzolf v. Superior Court*, ___ Ariz. ___, 912 P.2d 1373 (App.1995).

In deciding whether forfeiture constitutes "punishment," we look more to the purpose of the sanction than to its label. A civil sanction may serve remedial, retributive or deterrent purposes, and the Supreme Court has held that the "punishment" question turns on whether the sanction has any punitive purpose:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448, 109 S.Ct. at 1902.

Whether a civil sanction constitutes punishment is determined "only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.* at 447, 109 S.Ct. at 1901. "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance." *Id.* Rather, a sanction is punitive when, as applied in the individual case, it serves the goals of punishment. *Id.* at 448, 109 S.Ct. at 1902. Legislative declaration regarding the nature of the sanction is not of paramount importance. We appreciate that the Arizona legislature has declared that a civil forfeiture under the Arizona racketeering act ("RICO") is "remedial and not punitive." *See* A.R.S. § 13-2314(L) (Supp.1995).

Both Divisions of this Court previously have accepted that declaration. *See In re 2120 S. 4th Ave.*, 177 Ariz. 599, 603, 870 P.2d 417, 421 (App.1994); *Rhue v. Dawson*, 173 Ariz. 220, 233, 841 P.2d 215, 228 (App.1992); *In re One 1983 Toyota*, 168 Ariz. 399, 403, 814 P.2d 356, 360 (App.1991). However, the latter two cases are distinguished because they preceded *Austin*, in which the Supreme Court found that a civil forfeiture serves punitive as well as remedial purposes. *Austin*, 509 U.S. at ___, 113 S.Ct. at 2812. The Division Two case found that the legislative declaration that civil forfeiture was "remedial and not punitive" meant that *Austin* was "inapplicable." *2120 S. 4th Ave.*, 177 Ariz. at 603, 870 P.2d at 421. We respectfully conclude that this finding is erroneous. A Supreme Court definition of what constitutes "punishment" in a constitutional context cannot be rendered "inapplicable" by legislation with a different definition.

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . [That the constitution declares that it is the supreme law of the land] confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Marbury v. Madison, 5 U.S. 137, 176, 177, 180, 2 L.Ed. 60 (1803). We hold that the Supreme Court's interpretation of the Constitution, not A.R.S. section 13-2314(L), controls the "punishment" analysis.

The State argues that a forfeiture constitutes punishment only if its sole purpose is punitive. A pre-*Austin* Division Two case reached that conclusion, stating "our inquiry narrows to the question of whether the forfeiture cannot be fairly characterized as remedial, but only as a deterrent or retribution." *In re 1632 N. Santa Rita*, 166 Ariz. 197, 200, 801 P.2d 432, 435 (App.1990). In 1990 this was perhaps an arguable interpretation of *Halper*. However, we respectfully conclude that *Austin* compels the conclusion that *1632 N. Santa Rita's* search for any remedial purpose misconstrued *Halper's* direction to search for any punitive purpose:

> *Under United States v. Halper*, the question is whether
>
> forfeiture serves in part to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.

Austin, 509 U.S. at ___ n. 12, 113 S.Ct. at 2810 n. 12 (citation omitted).

In its motion for summary judgment, the State advised that the Arizona RICO act, A.R.S. sections 13-2301 to -2317 (Supp.1995), was adapted from, and broader than, the federal RICO act, 18 U.S.C. sections 1961 to 1968 (Supp.1995). The State quoted *Russello v. United States*, 464 U.S. 16, 17, 104 S.Ct. 296, 297, 78 L.Ed.2d 17 (1983), for the proposition that "[t]he legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. . . . " The State quoted from *United States v. Ginsburg*, 773 F.2d 798 (7th Cir.1985), *cert. denied*, 475 U.S.

1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986), to show that RICO civil forfeiture was intended as "a sanction against the individual" and "part of the penalty":

> Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, "it follows the defendant as a part of the penalty and thus [the statute] does not require that the government trace [the money], even though the forfeiture is not due until after conviction." [*United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), cert. denied, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985).]

Ginsburg, 773 F.2d at 801. The State also cited *Conner* for the proposition that the social policy of the RICO forfeiture statutes was " 'to attack the sources of economic power of organized crime in addition to removing from power and imprisoning those individuals who violate [RICO].' " *Conner*, 752 F.2d at 576 (quoting *United States v. Cauble*, 706 F.2d 1322, 1345 (5th Cir.1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984)). An Arizona case (cited by neither party) also states that RICO forfeiture serves a punitive purpose:

> Forfeiture proceedings under the authority of A.R.S. §§ 13-2314 to – 2317 and by §§ 13-4301 to -4315 are designed to take from a wrongdoer the fruits of the forbidden activity. The proceedings may be civil, but the predicate is criminal activity and the result is punitive.

State v. $19,238.00 in U.S. Currency, 157 Ariz. 178, 182, 755 P.2d 1166, 1170 (App.1987).

In summarizing the federal cases, the State advised the trial court that "a RICO forfeiture judgment is an in

personam money judgment against the defendant which is satisfiable from any asset the defendant owns or later acquires." In personam means "against the person." BLACK'S LAW DICTIONARY 791 (6th ed. 1990). In personam forfeitures traditionally have been understood as punishment for criminal wrongdoing; they are "assessments, whether monetary or in-kind, to punish the property owner's criminal conduct. . . . " *Austin*, 509 U.S. at ___, 113 S.Ct. at 2813 (Scalia, J., concurring).

The State successfully argued in the trial court that it was entitled to a $20 million in personam judgment because RICO forfeiture is an attack on wrongdoers and part of their penalty. On appeal, the State argues that RICO forfeiture is "remedial, not penal" because it removes "instruments" of illegal drug trade and compensates the State for the costs of investigating and prosecuting drug crimes and for expenditures on drug-related social problems. As previously stated, the Supreme Court has rejected this kind of argument by concluding that proof of a remedial purpose is not necessarily proof of no punitive purpose. *Austin*, at ___ 113 S.Ct. at 2811. The State's argument ignores the punitive purposes of RICO forfeitures in general, and of this judgment in particular. This judgment is punitive because it requires the Leyvas to pay for "instruments" that already have been removed by various governmental seizures. This judgment is punitive because it takes from the Leyvas all non-exempt property they legally own or presumably ever will own. This judgment is punitive because it is the Leyvas' lifetime indenture to the State of Arizona: a $20 million debt, with interest at ten percent per year.

On appeal, the State asserts that "[p]unishment of any individual simply has no place in the application of remedial forfeitures." The State follows that assertion with a long quotation, part of which is reproduced below, from a Supreme Court case which held that acts of Congress providing for confiscation of rebels' property during the Civil War were a legitimate exercise of the war power of the United States:

> The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

Miller v. United States, 78 U.S. 268, 306, 20 L.Ed. 135 (1870).

The State asserts that "[p]roceeds of racketeering are illegal to possess because their expenditures complete the misallocation of resources," and appends this footnote:

> Recognition of the proceeds of crime for profit as
>
> tainted is instinctive, as demonstrated by history. For example, after Judas betrayed Christ for thirty silver pieces, and after he took his own life, the proceeds of his betrayal were termed "the price of blood". The silver was used

> to buy a field to bury strangers in (known thereafter as "the field of blood"), Matt. 27:3-8, in a manner that predicted the revolving fund for racketeering suppression in present day Arizona [A.R.S. section 13-2314.01 (Supp.1995)].

In our opinion, these references to governmental war powers and to the price of blood tend to illustrate further that the purposes of this in personam forfeiture are punitive, at least in part. We acknowledge that the State's arguments were more plausible in 1992, when its unopposed motion for summary judgment was granted. Much of our own certainty on the "punishment" analysis begins with *Austin*, which issued in 1993 and stated:

> [F]orfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment. . . . We turn next to consider whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (7) are properly considered punishment today.
>
> . . . .
>
> . . . We therefore conclude that forfeiture under these [statutes] constitutes "payment to a sovereign as punishment for some offense," [*Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989)] and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Austin, 509 U.S. at ___, ___, 113 S.Ct. at 2810, 2812 (footnote omitted). If a civil forfeiture constitutes punishment for purposes of the Excessive Fines Clause, it is also punishment for purposes of the Double Jeopardy Clause. *$405,089.23*, 33 F.3d at 1219.

In conclusion, we hold that the in personam forfeiture judgment in this case violates the Double Jeopardy Clause of the Fifth Amendment because it constitutes a second punishment, at least in part. On this record, we cannot decide how much of the forfeiture is punishment within the meaning of *Halper* and *Austin*. The forfeiture arguably serves both remedial and punitive purposes, and the point where "punitive" begins in this case has not yet been litigated in the trial court. Therefore, remand is necessary. *Halper* is instructive:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
>
> . . . .
>
> . . . Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

490 U.S. at 448-50, 109 S.Ct. at 1902 (footnote omitted) (emphasis added).

We do not hold that the State must choose between criminal penalties and civil forfeiture penalties when bringing a wrongdoer to justice; we do hold that when the State decides to pursue both penalties, it must not violate the Double Jeopardy Clause.

III

Arguing that the forfeiture judgment violates the Excessive Fines Clause, the Leyvas ask that we articulate an excessive fines test. In declining a similar request from *Austin*, the Supreme Court stated, "[p]rudence dictates that we allow the lower courts to consider that question in the first instance." *Austin*, 509 U.S. at ___, 113 S.Ct. at 2812. The Court remanded the case "for further proceedings consistent with this opinion." *Id.* We will now do the same in this case, for the excessive fines issue has not yet been presented to and decided by the trial court.

IV

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

KLEINSCHMIDT, P.J., and GARBARINO, J., concur.

APPENDIX E

A.R.S. § 13-2301 (in pertinent part)

§ 13-2301. Definitions

* * *

D. For the purposes of §§ 13-2312 through 13-2315, unless the context otherwise requires:

1. "Control", in relation to an enterprise, means the possession of sufficient means to permit substantial direction over the affairs of an enterprise and, in relation to property, means to acquire or possess.

2. "Enterprise" means any corporation, partnership, association, labor union, or other legal entity or any group of persons associated in fact although not a legal entity.

3. "Financial institution" means any business under the jurisdiction of the state banking department or a banking or securities regulatory agency of the United States or a business under the jurisdiction of the securities division of the corporation commission, the state real estate department or the department of insurance.

4. "Racketeering" means any act, including any preparatory or completed offense, which is committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, which would be chargeable or indictable under the laws of this state had the act occurred in this state and which would be punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

(a) Homicide.

(b) Robbery.

(c) Kidnapping.

(d) Forgery.

(e) Theft.

(f) Bribery.

(g) Gambling.

(h) Usury.

(i) Extortion.

(j) Extortionate extensions of credit.

(k) Prohibited drugs, marijuana or other prohibited chemicals or substances.

(l) Trafficking in explosives, weapons or stolen property.

(m) Participating in a criminal syndicate.

(n) Obstructing or hindering criminal investigations or prosecutions.

(o) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.

(p) Intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands.

(q) Resale of realty with intent to defraud.

(r) Intentional or reckless fraud in the purchase or sale of securities.

(s) Intentional or reckless sale of unregistered securities or real property securities.

(t) A scheme or artifice to defraud.

(u) Obscenity.

(v) Child pornography.

(w) Prostitution.

(x) Restraint of trade or commerce in violation of § 34-252.

(y) Terrorism.

(z) Money laundering.

(aa) Obscene or indecent telephone communications to minors for commercial purposes.

(bb) Counterfeiting marks as proscribed in § 44-1453.

5. "Records" means any book, paper, writing, record, computer program or other material.

6. "To remedy racketeering" means to enter a civil judgment pursuant to this chapter or chapter 39 of this title [relating to forfeiture procedures] against property or a person who is subject to liability, including liability for injury to the state that is caused by racketeering or by actions in concert with racketeering.

Arizona Revised Statutes (A.R.S.) § 13-2314

§ 13-2314. Racketeering; civil remedies by this state; definitions

A. The attorney general or a county attorney may file an action in superior court on behalf of a person who sustains injury to his person, business or property by racketeering as defined by § 13-2301, subsection D, paragraph 4 or by a violation of § 13-2312 for the recovery of treble damages and the costs of the suit, including reasonable attorney fees, or to prevent, restrain, or remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312. If the person against whom a racketeering claim has been asserted, including a forfeiture action or lien, prevails on that claim, the person may be awarded costs and reasonable attorney fees incurred in defense of that claim. In actions filed by the state or a county, awards of costs and reasonable attorney fees are to be assessed against and paid from monies acquired pursuant to §§ 13-2314.01 and 13-2314.03.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of any person who sustained injury to his person, business or property by the racketeering conduct and after a hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, issuing seizure warrants, entering findings of probable cause for in personam or in rem forfeiture, entering restraining orders or prohibitions or taking such other actions, including the

acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to forfeiture, damages or other remedies or restraints pursuant to this section as the court deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or the county which brings the action.

6. In personam forfeiture pursuant to chapter 39 of this title [Sections 13-4301-13-4315, relating to forfeiture

procedures] to the general fund of the state or county as appropriate, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of the interest of a person in:

(a) Any property or interest in property acquired or maintained by the person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which the person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and held by the person and all monies, negotiable instruments, securities and other property used or intended to be used by the person in any manner or part to facilitate commission of the offense and that the person either owned or controlled for the purpose of that use.

(d) Any other property up to the value of the subject property described in subdivision (a), (b) or (c) of this paragraph.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 or that any person is liable for under this section.

E. A person who is liable for conduct described in subsection D, paragraph 6, subdivision (a), (b) or (c) of this section is liable for the total value of all interests in property described in those subdivisions. The court shall enter an order of forfeiture against the person in the amount of the total value of all those interests less the value of any interests that are forfeited before or at the time of the entry of the final judgment.

F. A person or enterprise that acquires any property through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or through a violation of § 13-2312 is an involuntary trustee. The involuntary trustee and any other person or enterprise, except a bona fide purchaser for value who is reasonably without notice of the unlawful conduct and who is not knowingly taking part in an illegal transaction, hold the property, its proceeds and its fruits in constructive trust for the benefit of persons entitled to remedies under this section.

G. In addition to or in lieu of an action under this section the attorney general or a county attorney may file an in rem action pursuant to chapter 39 of this title for forfeiture, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of:

1. Any property or interest in property acquired or maintained by a person in violation of § 13-2312.

2. Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise

or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

3. All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense.

H. A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purposes of this subsection, a conviction may result from a verdict or plea including a no contest plea.

I. Notwithstanding any law creating a lesser period, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, including procedures pursuant to chapter 39 of this title, shall be commenced within seven years after actual discovery of the violation.

J. In any civil action brought pursuant to this section, the attorney general or a county attorney may file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court in the county in which such action is pending, and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the

action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.

K. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence test.

L. A civil action authorized by this section, including proceedings pursuant to chapter 39 of this title, is remedial and not punitive and does not limit and is not limited by any other previous or subsequent civil or criminal action under this title or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.

M. The attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted, including proceedings pursuant to chapter 39 of this title, or in which the court is interpreting this chapter or chapter 39 of this title. A party who files a notice of appeal from a civil action brought under this chapter or chapter 39 of this title shall serve the notice and one copy of the appellant's brief on the attorney general at the time the person files the appellant's brief with the court. This requirement is jurisdictional.

N. In this section and § 13-2312:

1. "Acquire" means for a person to do any of the following:

(a) Possess.

(b) Act so as to exclude other persons from using their property except on his own terms.

(c) Bring about or receive the transfer of any interest in property, whether to himself or to another person, or to secure performance of a service.

2. "Gain" means any benefit, interest or property of any kind without reduction for expenses of acquiring or maintaining it or incurred for any other reason.

3. "Proceeds" includes any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form.

Arizona Revised Statutes (A.R.S.) § 13-2318

§ 13-2318. Civil judgments; injury to the state

The court shall not reduce or increase the judgment in a civil action under this title because of the imposition or failure to impose a sanction in a separate criminal prosecution involving the same conduct but shall determine the civil judgment solely according to the civil remedies that are provided under this chapter and chapter 39 [Sections 13-4301-13-4315, relating to forfeiture procedures] of this title, including the amount of injury to the state. Injury to the state includes:

1. The expenditure of any public monies, including the expenses of law enforcement and prosecutors in pursuing civil and criminal remedies.

2. The amount of money or the value of other property that is exchanged or that would foreseeably be exchanged for prohibited drugs, marijuana or other prohibited chemicals or substances or that is used, made available to another or otherwise involved in a violation

of § 13-2317. The exchange of a prohibited chemical or substance for gain is a foreseeable consequence of the manufacture, production, transportation or sale of the prohibited chemical or substance.

3. The acquisition or gain of proceeds as defined in § 13-2314 of any offense included in the definition of racketeering as defined in § 13-2301, subsection D, paragraph 4.

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(2)

No. 99-1062

In The

Supreme Court of the United States

THE STATE OF ARIZONA,

Petitioner,

v.

FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona. The State of Arizona was the plaintiff in the trial court and the appellant in the court of appeals.

Respondents are Francisco F. Leyva and Sylvia Leyva, husband and wife, who were defendants in the trial court and appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents..... ii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 2

Conclusion 5

TABLE OF AUTHORITIES

Page

CASES CITED

State v. Leyva, 985 P.2d 498 (1998) 2

United States v. Austin, 509 U.S. 602 (1993) 3

United States v. Bajakian, 118 S.Ct. 2028, 141 L.Ed. 2d 314, 66 USLW 4514 (1988) 2, 3, 4

United States of America v. Real Property Located in El Dorado County, 59 F.3d 974 (9th Cir. 1994) 4

STATUTES CITED

A.R.S. § 13-2314 2

STATEMENT OF THE CASE

A. Material Facts

Although the Somoza enterprise was a large drug organization engaged in the importation, transportation, and sale of marijuana, Respondent Francisco Leyva was a small member of the enterprise between January 1987 and December 1989. Leyva's role in the enterprise was that of a "bag" man. Leyva did collect proceeds.

In 1989, at the conclusion of an investigation and court-ordered wiretap, agents conducted simultaneous searches, arrests, and seizures in Tucson, in the greater Phoenix area, and in Nogales, Arizona, the Leyvas' home town. Somoza, Leyva, and others were charged with racketeering and drug and money laundering offenses. In the companion criminal case, Leyva pled guilty to racketeering and money laundering offenses and was placed on probation by the sentencing Court.

B. Proceedings Below

The State initiated a civil forfeiture action against Francisco Leyva and his wife, among others, seeking **in personam** and **in rem** forfeiture judgments based on the conduct for which Leyva was indicated and placed on probation for. The State obtained a judgment of $20 million against members of the enterprise, which was entered against Leyva and his marital community in April, 1993. The Leyvas appealed, arguing that the judgment was precluded by the Double Jeopardy Clause and was excessive in violation of the Excessive Fines Clause. The court of appeals reversed on double jeopardy and excessive fines grounds and remanded the case for the

trial court to determine the appropriate sanction. *State of Arizona v. Leyva*, 909 P.2d 506 (Ariz. App. 1995) (*Leyva I*).

On remand, the Trial Court ruled on the excessive fines issue. On remand the court found that the legislative intent of A.R.S. § 13-2314 is remedial and that there was no evidence that the statute's purpose or effect is punitive, and the court concluded that any judgment greater than $50,000 would constitute punishment prohibited by the Excessive Fines Clause of the Eighth Amendment. In reducing the figure to $50,000, the trial court considered the nature of Mr. Leyva's personal culpability, as reflected by his role in the enterprise; the large number of people who participated in the enterprise; and the defendants' inability to pay determined by the defendants' present salary and income.

The court of appeals affirmed this judgment. *State v. Leyva*, 985 P.2d 498, 501-504 and reviewed the trial court's calculation of excessiveness for clear error. The Arizona Supreme Court denied the State's petition for review.

REASONS FOR DENYING THE WRIT

In *United States v. Bajakian*, 118 S.Ct. 2028, 141 L.Ed. 2d 314, 66 USLW 4514 (1988) the court held at page 5 as follows:

> "The Supreme Court, however has made clear that whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense and *not* by comparing the amount of the forfeiture to the amount of the owner's assets."

Although the Court now cannot look to the assets of a Defendant, it still must now look at the Defendant's individual liability in the crime committed. Whether we look at it either way, the in personam judgment ordered by the lower Court inappropriate.

It must be recalled that in 1991 Defendant Leyva pled guilty to two (2) felonies, conspiracy and illegally conducting an enterprise. This case was prosecuted by the Arizona Attorney General, the same agency prosecuting this appeal. Both of these offenses were probation available and Defendant *was* in fact placed on probation, which he has long since completed. Again, this goes back to *Bajakian, supra,* where the United States Supreme Court has held that the touchstone of the constitutional inquiry, such as the *one* herein, is proportionality. The amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish. Again here we are attempting to punish a person who received probation and was never even sent to prison.

In *Bajakian,* the Supreme Court refers time and again to *United States v. Austin,* 509 U.S. 602 (1993) thereby advancing the principles it stands for.

It is interesting that Justice Scalia, in his concurring opinion in *Austin,* distinguished in rem from in personam forfeitures and stated that the latter are designed as "assessments, whether or in kind, to punish the property owners' *criminal conduct,*" while in rem forfeitures are designed as "confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." 509 U.S. at 624. Again reference is being made to Defendant Leyva's involvement

which must be based upon his plea to two offenses for which he received probation.

In its decision at page 14 the Court of Appeals found that the parties apparently *agreed* that the correct test for excessiveness is the one set forth in the *United States of America v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1994). A review of the record indicates this was the test set forth by both parties. As such, the State has waived its right to proceed further. It is unfair to inform the Trial Court what the law is, and the facts to be applied and then raise in a higher court, that the agreed upon test was inappropriate.

Although the Trial Court may not have utilized the correct test, as it is now, at the time it did. But, it reached the proper result even if for the now incorrect reasons. Again, taking everything the State has set forth in its vast Memorandums and Briefs the issue under the new interpretation of the Excessive Fines clause is whether the amount of the in personam judgment is proportionate to Defendant's role and the number of people in the Somoza organization. Further the Trial Court stated the amount requested by the State was not proportionate to Defendant Leyva's culpability, hence a factual determination.

Therefore even under *Bajakian* standards, as now requested by the State, the Trial Court did consider Defendant Leyva's role, what he pled to, and the probated sentence he received. Defendant Leyva was in reality a "bag man", he transported money for the higher ups.

CONCLUSION

If we follow the logic of the State, a person on the low end of the totem pole who one time drives a load of marijuana for a major organization, regardless of assets, would be responsible the same as the Kingpin owner/ leader making the huge profits. This does not make any sense.

Wherefore, it is respectfully requested this Petition for Review be denied.

DATED: February 22, 2000

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Supreme Court, U.S.
FILED
MAR - 8 2000
CLERK

(3)

No. 99-1062

In The

Supreme Court of the United States

THE STATE OF ARIZONA,

Petitioner,

v.

FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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21pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE CONFLICTS AMONG STATE AND FEDERAL COURTS RELATING TO THE APPLICATION OF THE EXCESSIVE FINES CLAUSE ARE A PROPER BASIS FOR GRANTING A WRIT OF *CERTIORARI* 2

II. THE STATE HAS NOT CHANGED ITS POSITION WITH REGARD TO THE NINTH CIRCUIT'S TEST FOR PROPORTIONALITY 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

817 N.E. 29th Dr., Wilton Manors, Florida, 175 F.3d 1311 (11th Cir. 1999) 3

Austin v. United States, 509 U.S. 602 (1993) 1, 6

Bennis v. Michigan, 516 U.S. 442 (1996) 5

Real Property at 633 East 640 North, Orem, Utah, 2000 WL 38480 (January 19, 2000) 2

United States v. Dicter, 198 F.3d 1284 (11th Cir. 1999) 3

United States v. Real Property Located in El Dorado County, 59 F.3d 974 (9th Cir. 1995) 3, 4, 5

United States v. Salerno, 481 U.S. 739 (1987) 4

United States v. Ursery, 518 U.S. 267 (1996) 5

STATUTES:

A.R.S. §§ 13-2314(A) and 13-2318 5

INTRODUCTION

Respondents do not dispute that there is a conflict among the state and federal courts, and admit that the court of appeals applied an incorrect test for the determination of "gross disproportionality." (Opp. at 2-3.) Respondents' opposition relies entirely on the misconception of civil forfeiture as a form of criminal punishment. They assert that the appropriate civil remedy was necessarily limited by the criminal sentence of one of the two Respondents, Mr. Leyva, on two related criminal offenses,[1] and base their opposition on the irrelevant assertion that Mr. Leyva was less criminally culpable than at least one other member of the enterprise.

These arguments are based on the fundamental misconception that the Eighth Amendment Excessive Fines Clause requires civil remedies to be assessed only to the extent that the person on whom they are assessed would be punishable in a criminal sentencing. If this were so, the Constitution would require that the sanction on Mr. Leyva be relatively small,[2] and would forbid any sanction on the uninvolved Mrs. Leyva. In holding that the Excessive Fines Clause applies to some forfeitures in *Austin v. United States*, 509 U.S. 602 (1993), this Court did not

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[1] On remand in the civil case, the State obtained summary judgment on two offenses, other than the ones Leyva pled guilty to, based on the same overall facts. Appendix 26c.

[2] Relatively small, but not the 99.968% discount involved here. Leyva was a core enterprise member for three years. Appendix 25c. Enterprise membership under the statutes is not as expansive as Respondents assert (Opp. at 5), but its boundaries were not tested in this case because Respondents never contested their joint and several liability below.

foreclose parallel civil remedies that are not based on criminal culpability concepts. Rather, only the portion of a civil remedy that is in fact punitive is to be analyzed for excessiveness. Civil remedies may constitutionally remain independent. This Court should provide guidance on the distinction between punitive and remedial civil sanctions and, if found applicable, on the calculation of the amount of a punitive civil sanction that is permitted by the Constitution.

ARGUMENT

I. THE CONFLICTS AMONG STATE AND FEDERAL COURTS RELATING TO THE APPLICATION OF THE EXCESSIVE FINES CLAUSE ARE A PROPER BASIS FOR GRANTING A WRIT OF *CERTIORARI*.

Respondents do not dispute that there are conflicts among the state and federal courts relating to the application of the Eighth Amendment Excessive Fines Clause. Since the Petition was filed, those conflicts have become more pronounced in both state and federal courts.

The Utah Supreme Court has recently taken an approach to application of the Excessive Fines Clause that is similar to that of the Arizona Court of Appeals. In *Real Property at 633 East 640 North, Orem, Utah*, 2000 WL 38480 (January 19, 2000), the Utah Supreme Court held that a civil forfeiture assessed by the trial court could not be sustained. It ignored the threshold question whether and to what extent the civil forfeiture was remedial, treated the determination of proportionality as essentially the same as a criminal sentencing, and failed to address the

process of setting the forfeiture at a constitutionally permissible level. It simply denied any forfeiture after determining that forfeiture of the entire property would be excessive.[3] The Utah Supreme Court then applied a multi-factor test based on *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995), including the defendant's assets. 2000 WL 38480 at 3.

The Eleventh Circuit has taken a position directly contrary to the Arizona Court of Appeals, the Utah Supreme Court and the Ninth Circuit on this issue, stating, "[m]ore important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment." *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (citing *817 N.E. 29th Dr., Wilton Manors, Florida*, 175 F.3d 1311 (11th Cir. 1999)). Moreover, Respondents in this case have conceded that the Arizona Court of Appeals' consideration of the civil defendants' assets in determining whether this civil forfeiture is "grossly disproportionate" was erroneous. (Opp. at 2-3.)

This Court's guidance is needed to clarify that only the portion of a civil forfeiture that is punitive is subject to Excessive Fines Clause review and that the multi-factor test should not include many of the factors included in the *El Dorado* formulation, including consideration of the defendant's assets.

---

[3] The Utah Attorney General's petition for a writ of certiorari in the Utah case is due April 19, 2000.

II. THE STATE HAS NOT CHANGED ITS POSITION WITH REGARD TO THE NINTH CIRCUIT'S TEST FOR PROPORTIONALITY.

Respondents incorrectly assert that the State agreed in the court of appeals that the test set forth in *El Dorado* is correct, and that the State has therefore "waived its right to proceed further." (Opp. at 4.) The court of appeals' emphasis on the common ground it found in the parties' briefs does not mean that the State has changed its position or even that the common ground was substantial.

Petitioner discussed *El Dorado* in the court of appeals and concluded that *El Dorado* had to be "adjusted." The adjustments it suggested go to the heart of the *El Dorado* opinion. The State adopted the Ninth Circuit's observation that the word "excessive" appears twice in the same sentence of the Eighth Amendment in similar contexts and its conclusion that the Excessive Fines Clause should be read to employ a proportionality standard like the one applicable under the Excessive Bail Clause, in which "excessive" requires proportionality between the amount of bail and the "interest the Government seeks to protect," *i.e.*, the risk of flight. 59 F.3d at 983 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)). The State noted that in proceeds forfeiture cases the interests the government seeks to protect are: (1) the prevention/control of the conduct giving rise to forfeiture by disgorgement of the property acquired through the conduct (or an equivalent amount of money); (2) reducing the economic incentive to engage in the conduct and depriving the illegal industry of necessary capital; (3) compensation for the conduct's injury to the State, including its effects on the economy;

and (4) rededication of forfeited assets to remedial purposes, citing Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 13-2314(A) and 13-2318. The State emphasized that these interests do *not* include punishment of "criminal culpability," citing *Bennis v. Michigan*, 516 U.S. 442 (1996), *United States v. Ursery*, 518 U.S. 267 (1996), and A.R.S. § 13-2318. The State concluded that proportionality should be between the forfeiture and the actual or potential injury to the State. See Appendix 65f-67f (Petitioner's Opening Brief in Arizona Court of Appeals, at 34-35). It summed up its criticism of *El Dorado* by stating:

> The net effect of judicial treatment of a civil forfeiture as a criminal sentencing is to *create* a criminal sanction out of a civil sanction. If some form of criminal culpability/knowledge/intent is constitutionally required to avoid excessiveness, then the most purely remedial civil theories of recovery, such as spousal and donee liability in proceeds forfeiture cases and entrustment and agent liability in facilitation forfeiture cases, are constitutionally forbidden. . . . The holdings of *Bennis* and *Ursery* cannot be squared with this view of *Austin*.

Id. at 70f-71f. (Emphasis in original). The test that the State proposed was based on the *El Dorado* test only in the way that a sculpture is based on the original block of granite. What is removed is as important as what remains. Of the factors listed at 59 F.3d at 985-86, those that remained after the State's analysis were only: "the value of the property and the harm caused or threatened by the illegal activity, including at least (a) the amount of

drugs and their value; (b) the duration of the illegal activity; and (c) the effect on the community." *Id.* at 71f.

The State's Reply Brief renewed its criticism of the Ninth Circuit's approach. It stated:

> The view of the State is that civil remedies, with the exception of those defined as "fines" in *Austin v. United States*, 113 S.Ct. 2801 (1993), serve objectives that are separate from the objectives of criminal prosecution. In this view, the objective of civil sanctions is to prevent and remedy the effects of specified damaging conduct, the conduct to which civil liability may attach is defined by the broader civil concepts of financial responsibility rather than by individual criminal culpability and the assessment of sanctions flows from the same considerations as those applied to assessment of money judgments in civil tort cases. This view is reflected in the wording and structure of the statutes enacted by the Arizona Legislature and relied upon by the State in this case.

See Appendix 74g (Petitioner's Reply Brief in Arizona Court of Appeals, at 1-2). The State concluded, "[i]f the Eighth Amendment Excessive Fines Clause means that the Constitution forces the punitive world view on the Executive and Legislative Branches, independent civil remedies have been an evolutionary experiment that is no longer constitutionally viable." *Id.* at 75g.

Thus, the State has consistently objected to the Ninth Circuit's misinterpretation of *Austin* as viewing forfeitures as adjuncts to criminal punishment.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX F

Opening Brief
07/30/97
Pages 34-39

III. THE TRIAL COURT APPLIED INCORRECT CRITERIA IN ITS DETERMINATION OF "EXCESSIVENESS" IN THIS CASE.

A. Foundations For An Appropriate Test.

Federal courts have applied various tests for "excessiveness" since *Austin*. The Ninth Circuit test is found in *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995). *El Dorado* requires a two-prong inquiry. The first is an instrumentality test, which inquires whether there was a sufficiently close nexus between the property and the conduct giving rise to forfeiture, as described by Justice Scalia's concurring opinion in *Austin*, 113 S.Ct. at 2812-2815, and elaborated in *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). In proceeds cases the nexus is obviously sufficient by definition – the amount of the proceeds is the very amount of liability.

The *El Dorado* court then requires a proportionality inquiry. Because that court, writing after *$405,089.23* and before *Bennis v. Michigan*, 116 S.Ct. 994 (1996), and *Ursery*, understood *Austin* as requiring courts to treat civil forfeiture as though it were criminal punishment, it identified the proportionality question as whether "forfeiture . . . would be *grossly disproportionate* given the nature and extent of [claimant's] criminal culpability." 59 F.3d at 985. (Emphasis added). Now that it is clear, after *Bennis*, that there need be no culpability at all, and, after *Ursery*, that

the *Austin* Court did not adopt the sweeping definition of punishment found in *$405,089.23, El Dorado* must be adjusted.[13] The foundation, however, is sound.

As the Ninth Circuit pointed out in *El Dorado*, the word "excessive" appears twice in the same sentence of the Eighth Amendment in similar contexts. Therefore, "the Excessive Fines Clause should be read to employ a proportionality standard as does the Supreme Court's interpretation of the Excessive Bail Clause, in which the Court reads 'excessive' to require proportionality between the amount of bail and the "interest the Government seeks to protect," *i.e.*, the risk of flight. 59 F.3d at 983, quoting *United States v. Salerno*, 481 U.S. 739 (1987). In proceeds forfeiture cases, the interests the government seeks to protect are: (1) the prevention/control of the conduct giving rise to forfeiture by disgorgement of the property acquired through the conduct (or an equivalent amount of money); (2) reducing the economic incentive to engage in the conduct and depriving the illegal industry of necessary capital; (3) compensation for its injury to the State, including its effects on the economy; and (4) rededication of forfeited assets to remedial purposes. A.R.S. §§ 13-2314(A) and 13-2318. They do *not* include

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[13] The Ninth Circuit's view of excessive fines clause limitations remains at odds with other circuits. The process has now returned to the Supreme Court in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996), *cert. granted, United States v. Hosep Krikor Bajakajian*, No. 96-1487, 1997 WL 134399 (May 17, 1997). Although that case involves a criminal forfeiture and therefore will not resolve the issue of the application of *Austin* to the civil forfeiture in this case, it will certainly provide clearer guidance on the factors to consider in determining excessiveness.

punishment of "criminal culpability." *Bennis*, 516 U.S. 994; *Ursery*, 116 S.Ct. 2135; A.R.S. § 13-2318. The proportionality should therefore be between the forfeiture and the actual or potential injury to the State, including the measures of damage in A.R.S. § 13-2318 and the general damages like those described above, mentioned in *Harmelin v. Michigan*, 501 U.S. 957, 1002-3 (1991).

The idea of considering factors based on the blameworthiness of the property owner beyond that required by the forfeiture cause of action, if any, is based on the perception that forfeiture is comparable to criminal punishment, a perception advanced by the Ninth Circuit's misinterpretation of *Austin* as viewing forfeitures as adjuncts to criminal punishment. This has been entirely undercut by *Bennis'* re-affirmation that there is no constitutional requirement that the property owner be culpable at all,[14] by *Ursery's* affirmance of the very clear distinction between civil and criminal in *89 Firearms;* by *Ursery's* clarification that *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), did not create a class of cases that are civil but entitled to treatment as though they were criminal; and by *Ursery's* recognition of the civil nature of deterrence and the entirely remedial nature of proceeds forfeiture. Thus, under a test like that in *El Dorado*, the "culpability" involved with an offense should be considered as it relates to the *harm* that was or could have been done, but not as it relates to the personal

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[14] "The Court's holding today is dramatically at odds with our holding in *Austin v. United States*." *Bennis v. Michigan*, 116 S.Ct. 994, 1010 (1996) (Stevens, J., dissenting).

characteristics of the person or persons involved. Likewise, the "culpability" of the property owner is not a permissible justification of a forfeiture to the extent that it depends on personal factors such as criminal history, personal background, likelihood of recidivism, lack of remorse or evil intent beyond whatever state of mind is required for liability, *if any*. Similarly, the criminal sentence that could have been imposed should be considered only as a very general barometer of the Legislature's general classification of the harm. Finally, the subjective "hardship" on the claimant is entirely irrelevant.[15] In other words, the damages should be computed as they would in any tort action, after adjustment for the fact that injury to the State is not the same as injury to property or to an individual.

Removal of the personal "guilt" and "punishment-worthiness" factors is appropriate. These considerations follow *Solem v. Helm*, 463 U.S. 277, 290-291 (1983), which employed three factors, (1) the inherent gravity of the offense, (2) sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. Individually and collectively, they are a logical dead end in civil forfeiture.

The entire concept of "gravity" of conduct is often inapplicable to a judgment of forfeiture. Most civil forfeitures do not even require actual moral culpability of an

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[15] It would also lead to unjustifiable results. A large judgment against a person without assets is no hardship, since it is uncollectible, but against a person with assets it is a great hardship. Thus the rich would be protected.

owner as an element. Forfeiture may result from negligence or from conduct by a morally blameless person, like the law firm that was the unsuccessful claimant of proceeds of crime in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). A morally blameless state of mind is no defense to forfeiture, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); and has no role in setting the judgment amount. In these Arizona forfeitures, the property owner need not be involved in any way, and there need be no actual criminal offense. A spouse of the person obtaining the proceeds and a donee of racketeering proceeds are both financially responsible regardless of "guilt." There is not necessarily any moral wrong or "gravity" to compare with the amount of the judgment.

Many civil forfeitures, like actions for negligent personal injury, cannot be meaningfully compared with other "similar conduct" on a relative "gravity" rating, or with other sanctions for "similar conduct." Two spouses of financiers may be equally ignorant of their marital partner's business, but may face drastically different liability because of the purely fortuitous circumstance that one of their spouses is advising a drug cartel and the other's spouse is engaged in a legitimate business. Of two property owners who are given property by people under equally innocent circumstances, one may learn that the source of the gift was legitimate while the other may learn that the gift is subject to forfeiture because it was the proceeds of drug sales. Focus on the culpability of the owner and the owner's personal background ignores the remedial and compensatory function of forfeiture. The

gravity of "similar conduct," like the gravity of the unfortunate selection of a ship captain/crew member, *United States v. Brig Malek Adhel*, 43 U.S. 210 (1844) (owner of ship financially responsible for acts of crew), or tenant, *Dobbins Distillery v. United States*, 96 U.S. 395 (1877) (owner of land and building financially responsible for conduct of lessee), is comparable only by the *result*, not by negligence without result. Forfeiture cannot be meaningfully compared with other sanctions for "similar conduct."

The criminal sentencing process takes account of the personal characteristics of the defendant. Age, family and marital status, personal history, criminal record, potential for violence or recidivism, acceptance of responsibility, remorse, perceived or predicted response to prison or other sanctions are considered. None of these facts have any necessary bearing on a forfeiture. All claimants are assessed the same measure. None can be assessed an "aggravated" judgment or a "mitigated" judgment. Sentences in other jurisdictions are as irrelevant as sentences in Arizona, so *Solem v. Helm's* final factor is as useless as the other two.

The net effect of judicial treatment of a civil forfeiture as a criminal sentencing is to *create* a criminal sanction out of a civil sanction. If some form of criminal culpability/knowledge/intent is constitutionally required to avoid excessiveness, then the most purely remedial civil theories of recovery, such as spousal and donee liability in proceeds forfeiture cases and entrustment and agent liability in facilitation forfeiture cases, are constitutionally forbidden. What began in *Austin* as a limit on those cases that *do* require criminal culpability under the

statute invoked would be converted into a rule that all forfeitures *must* require criminal culpability. The holdings of *Bennis* and *Ursery* cannot be squared with this view of *Austin*.

Basing the proportionality test on the goals of the Government, as required by *Salerno*, the *El Dorado* factors listed at 59 F.3d at 985-86 would include only the value of the property and the harm caused or threatened by the illegal activity, including at least (a) the amount of drugs and their value; (b) the duration of the illegal activity; and (c) the effect on the community. The criteria for determining excessiveness have not been announced by the Supreme Court or by any Arizona court. Appellant submits the criteria used by the trial court for review in this case.

B. The Trial Court's Incorrect Criteria.

The parties stipulated that the Somoza enterprise acquired no less than $10 million in marijuana proceeds during the time the defendant was a core member of the conspiracy. (IR 295, IR 306D) The trial court was therefore obligated to assess a judgment of at least $10 million, subject to the constitutional prohibition against excessive fines. (IR 306D P.4) The court framed the issue as follows: "The only issue remaining is whether the $10 million *in personam* judgment the State is now seeking is an excessive fine." [IR 298]. However, the trial court limited the judgment to $50,000, giving as its reasons its opinion that the culpability of the defendant was not proportionate to the proceeds acquired by the enterprise, that the financial effect of such a judgment would be "unduly harsh" on

the defendants, in particular that the judgment would work a lifetime indenture, and that there were other conspirators involved. (IR 306D at 5) None of these factors are appropriate in this case.

APPENDIX G

Reply Brief
10/16/97
Pages 1-2

I. INTRODUCTION.

The broad question presented in this case is the scope of the constitutional "excessive fines" limitation on the size of a civil judgment obtained by the government in a civil action brought to remedy illicit business conduct that is economically harmful to the public. The constitutional answer to this broad question will be a major factor in the direction of the continuing evolution of civil remedies as a governmental tool in the control of conduct that is harmful to the public health and safety.

Government use of civil remedies has evolved rapidly in the past quarter century. The law enforcement field is only one of many in which civil judgments have been sought by public representatives to protect or define the rights of citizens through judicial action. The application of civil remedies in the law enforcement field has met diverse reactions within the executive branch, from the judiciary and from legislators. On the issue presented in this case,[1] observers are divided between two

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[1] The evolution has been somewhat fragmented by controversial social issues. For example, the employment of civil remedies in drug enforcement has split advocates on the issue of the proper governmental role, if any, in the problem of drug abuse. In forfeiture cases, the balance between the need for expediency and the employment of seizures without prior judicial process has split advocates for and against such governmental authority. *See, e.g. United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993). The broad question

contrasting views of the role of civil remedies in actions brought by government representatives. The view reflected in *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom, United States v. Ursery*, 116 S.Ct. 2135 (1996), and in *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995), is that civil remedies like forfeiture are simply another way of punishing criminals, brought in separate proceedings but otherwise indistinguishable from fines. In this view, the objective of civil forfeiture sanctions is punishment, the conduct to which liability may attach is limited to individual criminal culpability and the assessment of sanctions must flow from the same considerations as those applied to sentencing in criminal cases. The view of the State is that civil remedies, with the exception of those defined as "fines" in *Austin v. United States*, 113 S.Ct. 2801 (1993), serve objectives that are separate from the objectives of criminal prosecution. In this view, the objective of civil sanctions is to prevent and remedy the effects of specified damaging conduct, the conduct to which civil liability may attach is defined by the broader civil concepts of financial responsibility rather than by individual criminal culpability and the assessment of sanctions flows from the same considerations as those applied to assessment of money judgments in civil tort cases. This view is reflected in the wording and structure of the statutes enacted by the Arizona Legislature and relied upon by the State in this case.

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presented in this case cuts across all subdivisions because the answer will apply to all government civil cases seeking judgments in all areas.

The fact that criminal prosecution and civil actions are generally consistent with some of the same goals, such as reduction of the incidence of criminal conduct, does not negate the reality that they are in many ways based on competing world views, one punitive and the other remedial.[2] If the Eighth Amendment Excessive Fines Clause means that the Constitution forces the punitive world view on the Executive and Legislative Branches, independent civil remedies have been an evolutionary experiment that is no longer constitutionally viable.

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[2] Holmes, *Forfeiture Achieves Proper Purposes By Appropriate Means*, 39 N.Y. Law Rev. 335 at 365-371 (1994).